CHAPTER 44
Miscellaneous Civil Law Matters

ARTICLE 1
Habeas Corpus

44-1-1. [Who may obtain writ.]

Every person imprisoned or otherwise restrained of his liberty, except in the cases in the following section specified, may prosecute a writ of habeas corpus, according to the provisions of this chapter, to obtain relief from such imprisonment or restraint, if it proves to be unlawful.

History: Laws 1884, ch. 1, § 1; C.L. 1884, § 2012; C.L. 1897, § 2781; Code 1915, § 2589; C.S. 1929, § 63-101; 1941 Comp., § 25-1101; 1953 Comp., § 22-11-1.

ANNOTATIONS

Cross references. — For when the petitioner will be discharged, *see* 44-1-15 NMSA 1978.

For causes for discharge of petitioner in custody under civil process, *see* 44-1-17 NMSA 1978.

For release on bail, *see* 44-1-19, 44-1-23, 44-1-24 NMSA 1978.

For constitutional provisions relating to habeas corpus, *see* N.M. Const., art. II, § 7 and N.M. Const., art. VI, §§ 3, 13.

For the necessity, before applying for a writ of habeas corpus, of exhausting post-conviction motion remedies attacking sentence, *see* 31-11-6 NMSA 1978 and Rule 5-802B NMRA.

For mentally ill or deficient patients retaining the right to habeas corpus after commitment, *see* 43-1-12 and 43-1-13 NMSA 1978.

Meaning of "this chapter". — The term "this chapter" appeared in the original act, which was divided into three unnumbered divisions, to-wit: habeas corpus, §§ 1 to 36; mandamus, §§ 37 to 50; prohibition, §§ 51 to 56; and apparently referred to §§ 1 to 36, the operative provisions of which are compiled as 44-1-1 to 44-1-22, 44-1-25 to 44-1-37 NMSA 1978.

I. GENERAL CONSIDERATION.

Habeas corpus claims not barred by appeal. — If a habeas corpus petitioner's claim was addressed on appeal, but was denied, the habeas claim is not banned if it is grounded in facts beyond the record previously presented on appeal and if the additional facts are those which could not, or customarily would not, be developed in a trial on criminal charges. A habeas corpus petitioner will not be precluded from raising issues that could have been raised on direct appeal either when fundamental error has occurred or when an adequate record to address the claim properly was not available on direct appeal. Campos v. Bravo, 2007-NMSC-021, 141 N.M. 801, 161 P.3d 846; State v. Sutphin, 2007-NMSC-045, 142 N.M. 191, 164 P.3d 72.

New Mexico does not impose a statute of limitations on habeas corpus petitioners. State v. Sutphin, 2007-NMSC-045, 142 N.M. 191, 164 P.3d 72.

Laches do not apply to habeas corpus proceedings. State v. Sutphin, 2007-NMSC-045, 142 N.M. 191, 164 P.3d 72.

Criteria to determine if a new rule has been established. — A case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. Thus, a court establishes a new rule when its decision is flatly inconsistent with the prior governing precedent and is an explicit overruling of an earlier holding. Kersey v. Hatch, 2010-NMSC-020, 148 N.M. 381, 237 P.3d 683.

Standard to determine whether new rule applies retroactively to finalized criminal convictions. — New rules should not be afforded retroactive effect unless (1) the rule is substantive in nature, in that it alters the range of conduct or class of persons that the law punishes; or (2) although procedural in nature, the rule announces a watershed rule of criminal procedure. Kersey v. Hatch, 2010-NMSC-020, 148 N.M. 381, 237 P.3d 683.

New rule in felony murder cases cannot be applied retroactively. — The court's opinion in State v. Frazier, 2007-NMSC-032, 142 N.M. 120, 164 P.3d 1, which held for the first time that multiple separate convictions of felony murder and the predicate felony violate the double jeopardy clause, announced a new rule that is procedural in nature and is not subject to retroactive application in habeas corpus proceedings. Kersey v. Hatch, 2010-NMSC-020, 148 N.M. 381, 237 P.3d 683.

Where petitioner's multiple separate convictions of felony murder and the predicate felony of kidnapping had been finalized more than ten years before the court's opinion in State v. Frazier, 2007-NMSC-032, 142 N.M. 120, 164 P.3d 1 was filed, the rule announced in Frazier did not apply to defendant's convictions. Kersey v. Hatch, 2010-NMSC-020, 148 N.M. 381, 237 P.3d 683.

Lack of advice concerning immigration consequences of plea is an old rule. — The ineffective assistance of counsel rules stated in State v. Paredez, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799 and Padilla v. Kentucky, 130 S.Ct. 1473 (2010), which require criminal defense attorneys to determine the immigration status of their clients and advise non-citizen clients of the specific immigration consequences of pleading

guilty, including whether deportation would be virtually certain, is an old rule and applies retroactively to cases on collateral review. State v. Ramirez, 2012-NMCA-057, 278 P.3d 569, cert. granted, 2012-NMCERT-006.

Lack of advice concerning immigration consequences of plea. — Where petitioner filed a writ of coram nobis requesting the court to vacate petitioner's 1997 misdemeanor convictions for possession of marijuana and drug paraphernalia, and concealing identity; petitioner was facing definite deportation at the time petitioner plead guilty to the charges; and petitioner's counsel failed to advise petitioner about any immigration consequences of pleading guilty and petitioner was prejudiced by that, petitioner should have been advised, as required by State v. Paredez, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799 and Padilla v. Kentucky, 130 S.Ct. 1473 (2010), that deportation would almost certainly result from petitioner's convictions and because petitioner established ineffective assistance of counsel and prejudice, petitioner should have an opportunity to withdraw the guilty plea. State v. Ramirez, 2012-NMCA-057, 278 P.3d 569, cert. granted, 2012-NMCERT-006.

Proceeding in habeas corpus is in restricted sense a civil proceeding. In re Fullen, 17 N.M. 405, 132 P. 1137 (1913).

Habeas corpus is not a special statutory proceeding. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941).

Must apply to district court before proceeding in supreme court. — Where although no direct appeal is taken from the judgments of conviction which are now attacked, the prisoner has the right under New Mexico law to bring habeas corpus in the state courts, and he must apply to a district court for habeas corpus before an original proceeding may be brought in the New Mexico supreme court. Cox v. Raburn, 314 F.2d 856 (10th Cir.), cert. denied, 374 U.S. 853, 83 S. Ct. 1920, 10 L. Ed. 2d 1074 (1963).

Denial of petition for habeas corpus by district court not appealable. State v. Clark, 83 N.M. 484, 493 P.2d 969 (Ct. App. 1971), cert. denied, 83 N.M. 473, 493 P.2d 958 (1972).

No constitutional right to transcript. — Absent a showing of special circumstances, defendant had no federal constitutional right to a copy of the transcript for use in preparation of a motion for post-conviction relief or a petition for habeas corpus. State v. Toussaint, 84 N.M. 677, 506 P.2d 1224 (Ct. App. 1973).

State remedies not exhausted when grounds not presented to state. — When grounds urged for federal habeas corpus relief may be but are not presented to a state court, the state remedies have not been exhausted. Where the state district court habeas corpus is dismissed by counsel for the prisoner with the knowledge and acquiescence of the prisoner, the subsequent denials of original proceedings in the state supreme court conformed with the state practice and do not detract from the

availability of a state court remedy. Cox v. Raburn, 314 F.2d 856 (10th Cir.), cert. denied, 374 U.S. 853, 83 S. Ct. 1920, 10 L. Ed. 2d 1074 (1963).

Petition from juvenile court need not be presented to district. — To require presentation of a petition for habeas corpus in the first instance, in a juvenile court case, to the district judge would be a vain and useless prerequisite. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Cumulative doctrine has no merit in habeas corpus proceeding, particularly when each of the claimed points has been specifically ruled upon by the highest court of the jurisdiction and is found to be without merit. Nelson v. Cox, 66 N.M. 397, 349 P.2d 118 (1960).

In habeas corpus proceedings, movant has burden of showing that he is entitled to the writ and the writ should be denied where the allegations are insufficient. Roberts v. Staples, 79 N.M. 298, 442 P.2d 788 (1968).

Burden to prove testimony false and used to procure conviction. — In habeas corpus proceedings the burden is on the petitioner to prove not only that the testimony admitted was false but that it was knowingly, willfully and intentionally used by the prosecution to procure the conviction. Johnson v. Cox, 72 N.M. 55, 380 P.2d 199, cert. denied, 375 U.S. 855, 84 S. Ct. 117, 11 L. Ed. 2d 82 (1963).

With confessions court looks only to behavior of police officers. — In determining whether there has been a denial of due process by the admission into evidence of a confession alleged to have been involuntarily obtained, the court is not concerned with the motive of the petitioner in confession or whether the signed confession contained the truth, but only with whether the behavior of the law enforcement officers was such as to overbear petitioner's will to resist and bring about a confession not freely determined. Johnson v. Cox, 72 N.M. 55, 380 P.2d 199, cert. denied, 375 U.S. 855, 84 S. Ct. 117, 11 L. Ed. 2d 82 (1963).

Habeas corpus does not lie where guilty plea made intelligently. — Habeas corpus relief did not lie on claim that guilty plea was not intelligently made where record showed that defendant answered both by himself and through an interpreter to questions put by the judge to be sure that defendant knew what he was doing when he pleaded guilty. Orosco v. Cox, 359 F.2d 764 (10th Cir. 1966).

No relief where absence of attorney causes no prejudice. — Habeas corpus relief was refused where defendant was not furnished counsel at a preliminary hearing nor upon arraignment where he pleaded not guilty to an indictment, since no prejudice was shown where defendant did not testify at the preliminary hearing, and no contention is made that any incriminating statements were made then or upon his arraignment. Gallegos v. Cox, 341 F.2d 107 (10th Cir.), cert. denied, 381 U.S. 918, 85 S. Ct. 1548, 14 L. Ed. 2d 438 (1965).

No relief where no ground for collateral attack occurred. — Where the record fails to establish any prejudice resulting from anything which happened at the preliminary hearing, where defendant was without representation by counsel, and since upon the defendant's arraignment before the state district court counsel was appointed for him and he pleaded guilty, and no question is raised as to the voluntary nature of that plea or as to the competence of counsel, in the circumstances nothing which occurred at the preliminary hearing is any ground for collateral attack, and the trial court acted properly in dismissing the petition without a hearing. Downing v. New Mexico State Supreme Court, 339 F.2d 435 (10th Cir. 1964).

Restoring good-time credits. — A petition for a unit of habeus corpus is the proper avenue to challenge the unconstitutional deprivation of good-time credits, even if it would not result in an immediate release. Lopez v. LeMaster, 2003-NMSC-003, 133 N.M. 59, 61 P.3d 185.

Remedy when prison discipline is vindicated by subsequent events. — Where the corrections department forfeited petitioner's earned good time and placed petitioner in a maximum security facility after a hearing officer determined that petitioner had raped another inmate; the corrections department violated petitioner's due process rights by denying petitioner an opportunity to call witnesses or elicit their written testimony at the prison disciplinary hearing; petitioner was subsequently tried and convicted of the rape in district court; and in petitioner's habeas corpus proceeding, the district court ordered the corrections department to restore petitioner's good-time credits, remove the disciplinary hearing findings from petitioner's record, never to use findings of the disciplinary hearing against defendant, and never to pursue the same factual allegations that were the subject of the disciplinary hearing in later proceedings against petitioner, the district court's remedies for the violation of petitioner's due process rights was an abuse of discretion because the discipline of the corrections department was vindicated by petitioner's intervening criminal conviction. Perry v. Moya, 2012-NMSC-040, 289 P.3d 1247.

II. JURISDICTION OF COURT.

Writ available only when lower court exceeds jurisdiction. — A writ of habeas corpus is available only when the lower court has exceeded its jurisdiction and cannot take the place of a writ of error or an appeal, however irregular or erroneous the judgment may be. Notestine v. Rogers, 18 N.M. 462, 138 P. 207 (1914); In re Cica, 18 N.M. 452, 137 P. 598 (1913); In re Canavan, 17 N.M. 100, 130 P. 248 (1912); In re Peraltareavis, 8 N.M. 27, 41 P. 538 (1895), appeal dismissed, 18 S. Ct. 945, 42 L. Ed. 1207 (1897).

Deficiency in indictment not grounds for review. — In habeas corpus proceeding the information or indictment under which a petitioner was sentenced is not open to review on grounds of deficiencies therein. Such proceeding is a collateral attack upon the judgment, and the only question for decision is whether the trial court possessed

jurisdiction of the parties, jurisdiction of the subject matter and the power to impose the sentence. Roehm v. Woodruff, 64 N.M. 278, 327 P.2d 339 (1958).

Writ not used for collateral attack on contempt proceedings. — Attack on contempt proceedings collaterally for violation of a writ of mandamus may not be made by writ of habeas corpus, since the inquiry in habeas corpus is limited to the jurisdiction of the court. Delgado v. Chavez, 5 N.M. 646, 25 P. 948, aff'd, In re Delgado, 140 U.S. 586, 11 S. Ct. 874, 35 L. Ed. 578 (1891).

Writ of habeas corpus is in nature of collateral attack on a judgment upon which commitment has issued, and would lie only when the judgment under attack was absolutely void because the court which rendered the judgment was without jurisdiction. Orosco v. Cox, 75 N.M. 431, 405 P.2d 668 (1965).

Writ lies only when judgment absolutely void. — Writs of habeas corpus are collateral attacks upon the judgments upon which commitments are issued and will lie only when the judgment attacked is absolutely void for the reason that the court rendering it was without jurisdiction to do so. Johnson v. Cox, 72 N.M. 55, 380 P.2d 199, cert. denied, 375 U.S. 855, 84 S. Ct. 117, 11 L. Ed. 2d 82 (1963).

Inquiry directed to fairness of entire proceedings. — In determining whether the deprivation of constitutional rights amounts to a denial of due process, the inquiry on habeas corpus is directed to a review of the entire proceedings, and if the total result was the granting to accused of a fair and deliberate trial, then no constitutional right has been invaded, and the proceedings will not be disturbed. Johnson v. Cox, 72 N.M. 55, 380 P.2d 199, cert. denied, 375 U.S. 855, 84 S. Ct. 117, 11 L. Ed. 2d 82 (1963).

Function of writ of habeas corpus is not to review record for errors of the trial court, and where the petition states no facts showing petitioner is unlawfully deprived of his liberty, it will be denied. Smith v. People, 71 N.M. 112, 376 P.2d 54 (1962).

Incorrect assessment of fines curable by appeal not by writ. — Assessing fines for several acts and omissions on the part of relators, with alternative imprisonment, where such acts constituted but one offense, though irregular, does not make the entire punishment void, and is curable in the court below, or on appeal, but not by habeas corpus. In re Sloan, 5 N.M. 590, 25 P. 930 (1891).

Without prejudice, form of indictment not subject to writ. — In habeas corpus the form of an indictment or information is not open to review unless the petitioner has suffered prejudice from it. Roehm v. Woodruff, 64 N.M. 278, 327 P.2d 339 (1958).

Extradition. — In a habeas corpus proceeding in the asylum state to determine whether to deliver the fugitive, the asylum state may only consider whether the extradition documents on their face are in order, whether the petitioner has been charged with a crime in the demanding state, whether the petitioner is the person named in the request for extradition, and whether the petitioner is a fugitive. The

proceeding cannot be transformed into an inquiry into the appropriateness of the demanding state's actions. Colfax Cnty. Bd. of Cnty. Comm'rs v. State of N.M., 16 F. 3d 1107 (10th Cir. 1994).

III. CUSTODY OF CHILD.

Writ used to consider custody of infant issues. — It is fundamental that under appropriate circumstances, habeas corpus is an available remedy by which to consider controversies involving the issue of custody of infants. Roberts v. Staples, 79 N.M. 298, 442 P.2d 788 (1968).

When determining custodial rights of children inquiry is generally broader. — The writ of habeas corpus finds its origin in common law. It issues as a matter of right and not as a matter of course. When prosecuted as a means of determining custodial rights of children, however, the inquiry is generally broader than that normally involved in habeas corpus. The child's welfare becomes a prime consideration irrespective of the parties' interests, although the natural rights of parents, guardians or lawful claimants are entitled to due consideration. Roberts v. Staples, 79 N.M. 298, 442 P.2d 788 (1968).

Custody granted only when prima facie legal right shown. — In cases dealing with infants, it is uniformly held that a writ of habeas corpus will be granted only in those cases where the applicant shows a prima facie legal right to the custody of the child. Roberts v. Staples, 79 N.M. 298, 442 P.2d 788 (1968).

Judgment from proceeding appealable. — A judgment in habeas corpus proceedings instituted to test the right of respective claimants to the custody of a minor is appealable. Evens v. Keller, 35 N.M. 659, 6 P.2d 200 (1931).

Former judgment in habeas corpus is res judicata. — A former adjudication in habeas corpus on the rights of rival claimants to the custody of a minor is conclusive between such parties in a subsequent proceeding involving the same question on the same state of facts existing at the time of the former adjudication. Evens v. Keller, 35 N.M. 659, 6 P.2d 200 (1931).

Grandparents have legal right to apply for writ of habeas corpus when the issue of custody of infants is involved. Roberts v. Staples, 79 N.M. 298, 442 P.2d 788 (1968).

Law reviews. — For note, "Post-Conviction Relief After Release From Custody: A Federal Message and a New Mexico Remedy," see 9 Nat. Resources J. 85 (1969).

For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus § 117.

Right of one detained pursuant to quarantine to habeas corpus, 2 A.L.R. 1542.

Loss of jurisdiction by delay in imposing sentence, 3 A.L.R. 1003.

Right of state or public officer to appeal from an order in habeas corpus releasing one from custody, 10 A.L.R. 385, 30 A.L.R. 1322.

Habeas corpus to test constitutionality of ordinance under which petitioner is held, 32 A.L.R. 1054.

Right to discharge on ground that prosecution was barred by limitations, where defendant had pleaded guilty after statute had run, 37 A.L.R. 1116.

Habeas corpus in case of sentence which is excessive because imposing both fine and imprisonment, 49 A.L.R. 494.

Right to prove absence from demanding state or alibi on habeas corpus in extradition proceedings, 51 A.L.R. 797, 61 A.L.R. 715.

Power to grant writ of habeas corpus pending appeal from conviction, 52 A.L.R. 876.

Habeas corpus as remedy for exclusion of eligible class or classes of persons from jury list, 52 A.L.R. 927.

Habeas corpus to test the sufficiency of indictment or information as regards the offense sought to be charged, 57 A.L.R. 85.

Habeas corpus as remedy for delay in bringing accused to trial or to retrial after reversal, 58 A.L.R. 1512.

Arresting one who has been discharged on habeas corpus or released on bail, 62 A.L.R. 462.

Illegal or erroneous sentence as ground for habeas corpus, 76 A.L.R. 468.

Bar of limitations as proper subject of investigation in extradition proceedings or in habeas corpus proceedings for release of one sought to be extradited, 77 A.L.R. 902.

Determination in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged, 81 A.L.R. 552, 40 A.L.R.2d 1151.

Pending suit for annulment, divorce or separation as affecting remedy by habeas corpus for custody of child, 82 A.L.R. 1146.

Motive or ulterior purpose of officials demanding or granting extradition as proper subject of inquiry on habeas corpus, 94 A.L.R. 1496.

Discharge on habeas corpus after conviction as affecting claim or plea of former jeopardy, 97 A.L.R. 160.

Jurisdiction of court in divorce suit to award custody of child as affected by orders in, or pendency of, proceedings in habeas corpus for custody of child, 110 A.L.R. 745.

Habeas corpus as remedy in case of insanity of one convicted of crime, 121 A.L.R. 270.

Disqualification of judge who presided at trial or of juror as ground of habeas corpus, 124 A.L.R. 1079.

Failure to examine witnesses to determine degree of guilt before pronouncing sentence upon plea of guilty as ground for habeas corpus, 134 A.L.R. 968.

Change of judicial decision as ground of habeas corpus for release of one held upon previous adjudication or conviction of contempt, 136 A.L.R. 1032.

Mistreatment of prisoner lawfully in custody as ground for habeas corpus, 155 A.L.R. 145.

Defective title to office of judge, prosecuting attorney, or other officer participating at petitioner's trial or confinement as ground for habeas corpus, 158 A.L.R. 529.

Denial of relief to prisoner on habeas corpus as bar to second application, 161 A.L.R. 1331.

Right to aid of counsel in application or hearing for habeas corpus, 162 A.L.R. 922.

Invalidity of prior condition or sentence as ground for habeas corpus where one is sentenced as second offender, 171 A.L.R. 541.

Jurisdiction of habeas corpus proceedings for custody of child having legal domicil in other states, 4 A.L.R.2d 7.

Former jeopardy as ground for habeas corpus, 8 A.L.R.2d 285.

Habeas corpus on ground of deprivation of right to appeal, 19 A.L.R.2d 789.

Habeas corpus to review commitment for contempt for failure to obey court order or decree either beyond power or jurisdiction of court or merely erroneous, 12 A.L.R.2d 1059.

Nonresidence as affecting one's right to custody of child in habeas corpus proceedings, 15 A.L.R.2d 432.

Existence of other remedy as affecting habeas corpus on ground of restoration of sanity of one confined as an incompetent other than in connection with crime, 21 A.L.R.2d 1004.

Habeas corpus on ground of restoration to sanity of one confined as an incompetent other than in connection with crime, 21 A.L.R.2d 1004.

Insanity of accused at time of commission of offense (not raised at trial) as ground for habeas corpus after conviction, 29 A.L.R.2d 703.

Waiver or loss of accused's right to speedy trial, 57 A.L.R.2d 302.

Child custody provisions of divorce or separation decree as subject to modification on habeas corpus, 4 A.L.R.3d 1277.

Habeas corpus as remedy for infringement of right of accused to communicate with attorney, 5 A.L.R.3d 1360.

Support of child, power of court in habeas corpus proceedings relating to custody of child to adjudicate amount which shall be paid for, or to modify agreement in that regard, 17 A.L.R.3d 764.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction, 34 A.L.R.3d 16.

Modern status of rule relating to jurisdiction of state court to try criminal defendant brought within jurisdiction illegally or as result of fraud or mistake, 25 A.L.R.4th 157.

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus - modern cases, 26 A.L.R.4th 455.

Relief available for violation of right to counsel at sentencing, 65 A.L.R.4th 183.

Abuse of writ as basis for dismissal of state prisoner's second or successive petition for federal habeas corpus, 60 A.L.R. Fed. 481.

Effect of escape from state custody on petitioner's rights in federal habeas corpus proceedings, 61 A.L.R. Fed. 938.

Availability of postconviction relief under 28 U.S.C.S. § 2254 based on alleged governmental violation of Interstate Agreement on Detainers Act (18 U.S.C.S. Appx), 63 A.L.R. Fed. 155.

Review by federal civil courts of court-martial convictions, 95 A.L.R. Fed. 472.

39A C.J.S. Habeas Corpus § 163.

44-1-2. [Detention under judgment or execution; contempt.]

The following persons are not entitled to prosecute such writ: persons committed or detained by virtue of the final judgment, conviction or decree of any competent tribunal or by virtue of an execution issued upon such judgment or decree; but no order of commitment for any alleged contempt, or upon proceedings as for contempt, to enforce the rights or remedies of any party shall be deemed a judgment, conviction or decree within the meaning of this section; nor shall any attachment or other process issued upon any such order be deemed an execution within the meaning of this section.

History: Laws 1884, ch. 1, § 2; C.L. 1884, § 2013; C.L. 1897, § 2782; Code 1915, § 2590; C.S. 1929, § 63-102; 1941 Comp., § 25-1102; 1953 Comp., § 22-11-2.

ANNOTATIONS

Cross references. — For when petitioner will be remanded to custody, *see* 44-1-16 NMSA 1978.

Decision not by "competent" court when constitutional guarantees denied. — For a court to be competent, jurisdiction must be present, and that jurisdiction clearly may be lost. When certain constitutional guarantees are denied, overlooked or omitted, the conviction or sentence is not by a "competent" court. Orosco v. Cox, 75 N.M. 431, 405 P.2d 668 (1965).

In habeas corpus proceeding supreme court may receive evidence outside record to establish the absence or loss of jurisdiction through denial of any of the rights guaranteed to a prisoner at the bar by either the United States or New Mexico constitutions. Orosco v. Cox, 75 N.M. 431, 405 P.2d 668 (1965).

Prison disciplinary hearings. — Disciplinary hearings within the corrections department qualify as "tribunals" within the scope of this section and the habeas corpus statutes. Lopez v. LeMaster, 2003-NMSC-003, 133 N.M. 59, 61 P.3d 185.

Law reviews. — For note, "Post-Conviction Relief After Release From Custody: A Federal Message and a New Mexico Remedy," see 9 Nat. Resources J. 85 (1969).

For article, "Prisoners Are People," see 10 Nat. Resources J. 869 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus §§ 64 to 73, 94 to 98.

Power to grant writ of habeas corpus pending appeal from conviction, 52 A.L.R. 876.

Illegal or erroneous sentence as ground for habeas corpus, 76 A.L.R. 468.

Change of judicial decision as ground for habeas corpus for release of one held upon previous adjudication of contempt, 136 A.L.R. 1032.

Habeas corpus to review commitment for contempt for failure to obey court order or decree either beyond power or jurisdiction of court or merely erroneous, 12 A.L.R.2d 1059.

39 C.J.S. Habeas Corpus §§ 81, 113.

44-1-3. [Application for writ; to whom made; petition; signature; verification.]

Application for such writ shall be made by petition to any judge of the supreme court, signed and verified either by the party for whose relief it is intended, or by some person in his behalf, as follows: to the supreme or district court or to any judge thereof, being within the district where the prisoner is detained; or if there is no such officer within such district, or if he be absent or from any cause is incapable of acting, or has refused to grant such writ, then to some officer having such authority residing in any other district.

History: Laws 1884, ch. 1, § 3; C.L. 1884, § 2014; Laws 1889, ch. 17, § 2; C.L. 1897, § 2783; Code 1915, § 2591; C.S. 1929, § 63-103; 1941 Comp., § 25-1103; 1953 Comp., § 22-11-3.

ANNOTATIONS

Cross references. — For the jurisdiction of the supreme court, see N.M. Const., art. VI, § 3.

For the jurisdiction of the district courts, see N.M. Const., art. VI, § 13.

For the contents of the petition, see 44-1-5 NMSA 1978.

For extraordinary writs from the supreme court, *see* Rule 12-504 NMRA.

Court may grant writ releasing any prisoner within district. — One district court of this state may grant a writ of habeas corpus for the release from the state penitentiary of a prisoner held therein under a commitment from another district court. As the prisoner was being detained within the first judicial district, there can be no question that the court in that district had jurisdiction to consider intervenor's petition for habeas corpus. State ex rel. Hanagan v. Dist. Court, 75 N.M. 390, 405 P.2d 232 (1965).

Therefore remedy of prohibition not available to state. — Where intervenor-defendant was ordered discharged from the custody of the warden of the penitentiary and the order was not appealed, it is accordingly final, and as intervenor was being detained within the first judicial district, there can be no question that respondent-district court judge had jurisdiction to consider intervenor's petition for habeas corpus and the

remedy of prohibition is thus not available to the state. Rodriguez v. Dist. Court, 83 N.M. 200, 490 P.2d 458 (1971).

Law reviews. — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus §§ 117, 120, 121.

Denial of relief to prisoner on habeas corpus as bar to second application, 161 A.L.R. 1331.

Jurisdiction of habeas corpus proceedings for custody of child having legal domicil in other states, 4 A.L.R.2d 7.

Abuse of writ as basis for dismissal of state prisoner's second or successive petition for federal habeas corpus, 60 A.L.R. Fed. 481.

39A C.J.S. Habeas Corpus §§ 161, 163, 165, 167.

44-1-4. [Application to officer residing outside district of detention; jurisdictional proof required.]

Whenever application for any such writ is made to any officer not residing within the district where the prisoner is detained, he shall require proof by oath of the party applying, or by other sufficient evidence, that there is no officer in such district authorized to grant the writ; or if there is one, that he is absent or has refused to grant such writ; or for some cause, to be specially set forth, is incapable of acting, and if such proof is not produced, the application shall be denied.

History: Laws 1884, ch. 1, § 4; C.L. 1884, § 2015; C.L. 1897, § 2784; Code 1915, § 2592; C.S. 1929, § 63-104; 1941 Comp., § 25-1104; 1953 Comp., § 22-11-4.

ANNOTATIONS

Law reviews. — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus §§ 105 to 109.

39 C.J.S. Habeas Corpus §§ 136 to 146.

44-1-5. [Petition for writ; allegations; exhibits.]

The petition shall state in substance:

A. that the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained and the place where, naming both parties, if their names are known, or describing them if they are not;

B. that such person is not committed or detained by virtue of any process, judgment, decree or execution, specified in Section 44-1-2 NMSA 1978;

C. the cause or pretense of such confinement or restraint, according to the knowledge or belief of the party verifying the petition;

D. if the confinement or restraint is by virtue of any warrant, or order, or process, a copy thereof shall be annexed, or it shall be averred that by reason of such prisoner being removed or concealed before application, a demand of such copy could not be made, or that such demand was made, and the legal fees therefor tendered to the officer or person having such prisoner in his custody, and that such copy was refused;

E. if the imprisonment is alleged to be illegal, the petition shall state in what the illegality consists.

History: Laws 1884, ch. 1, § 5; C.L. 1884, § 2016; C.L. 1897, § 2785; Code 1915, § 2593; C.S. 1929, § 63-105; 1941 Comp., § 25-1105; 1953 Comp., § 22-11-5.

ANNOTATIONS

Cross references. — For signature and verification of petition, *see* 44-1-3 NMSA 1978.

Post-conviction proceedings must be invoked before habeas corpus may be sought. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Juvenile court justice is not proper party in habeas corpus proceeding; only persons having physical custody of petitioner and able to produce him in court may properly be named as respondent in such proceeding. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Law reviews. — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus §§ 121 to 125.

Propriety of federal court's considering state prisoner's petition under 28 USCS § 2254 where prisoner has exhausted state remedies as to some, but not all, claims in petition, 43 A.L.R. Fed. 631.

Abuse of writ as basis for dismissal of state prisoner's second or successive petition for federal habeas corpus, 60 A.L.R. Fed. 481.

39A C.J.S. Habeas Corpus §§ 168, 169.

44-1-6. [Form of writ.]

Every writ of habeas corpus issued under the provisions of this chapter shall be substantially in the following form:

The state of New Mexico to the sheriff of, etc., or to A.B.:

You are hereby commanded to have the body of C.D., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatever name the said C.D. shall be called or charged, before E.F., judge of the district court, as etc. (or immediately after the receipt of this writ), to do, and receive what shall then and there be considered concerning the said C.D., and have you then and there this writ.

Witness, etc.

History: Laws 1884, ch. 1, § 6; C.L. 1884, § 2017; C.L. 1897, § 2786; Code 1915, § 2594; C.S. 1929, § 63-106; 1941 Comp., § 25-1106; 1953 Comp., § 22-11-6.

ANNOTATIONS

Meaning of "this chapter". — See same catchline in notes to 44-1-1 NMSA 1978.

Law reviews. — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus § 132.

39A C.J.S. Habeas Corpus § 176.

44-1-7. [Defects of form; names of prisoner and custodian.]

Such writ of habeas corpus shall not be disobeyed for any defect of form. It is sufficient:

A. if the person having the custody of the prisoner is designated either by his name or office, if he has any, or by his own name, or if both such names are unknown or uncertain, he may be described by any assumed appellation, and anyone who may be served with the writ, shall be deemed to be the person to whom it is directed, although it is directed to him by a wrong name or description, or to another person;

B. if the person who is directed to be produced is designated by name, or if his name is uncertain or unknown, he may be described in any other way so as to designate the person intended.

History: Laws 1884, ch. 1, § 7; C.L. 1884, § 2018; C.L. 1897, § 2787; Code 1915, § 2595; C.S. 1929, § 63-107; 1941 Comp., § 25-1107; 1953 Comp., § 22-11-7.

ANNOTATIONS

No civil liability for misconstruing when writ required. — Fact that district judge and law officer may have mistakenly concluded an order or writ was necessary to effect the release of child from unlawful detention charged in the criminal complaint, and that they may have misconstrued the nature of the order or writ which should be issued, did not confer upon plaintiff a right to recover damages for being compelled to release child from the unlawful imprisonment or restraint plaintiff was exercising over the child. Had a writ of habeas corpus been issued by the judge and served upon plaintiff, he could not be excused for disobedience thereof because of any defect of form. Torres v. Glasgow, 80 N.M. 412, 456 P.2d 886 (Ct. App. 1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39A C.J.S. Habeas Corpus § 176.

44-1-8. [Wrongful refusal of writ; forfeiture.]

If any officer herein authorized to grant writs of habeas corpus willfully refuses to grant such writ when legally applied for, he shall forfeit for any such offense, to the party aggrieved, one thousand dollars [($1,000)].

History: Laws 1884, ch. 1, § 8; C.L. 1884, § 2019; C.L. 1897, § 2788; Code 1915, § 2596; C.S. 1929, § 63-108; 1941 Comp., § 25-1108; 1953 Comp., § 22-11-8.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus § 131.

Liability of judge, court, administrative officer or other custodian of person for whose release the writ is sought, in connection with habeas corpus proceedings, 84 A.L.R. 807.

39A C.J.S. Habeas Corpus § 175.

44-1-9. [Return; contents; exhibits; signature; verification.]

The person upon whom such writ is duly served shall state in his return plainly and unequivocally:

A. whether he has or has not the party in his custody, or control, or under his restraint, and, if he has not, whether he has had the party in his custody, or under his control or restraint, at any and what time prior or subsequent to the date of the writ;

B. if he has the party in his custody or control, or under his restraint, the authority and true cause of such imprisonment or restraint, setting forth the same at large;

C. if the party is detained by virtue of any writ, warrant or other written authority, a copy thereof shall be annexed to the return, and the original shall be produced and exhibited on the return of the writ to the officer before whom the same is returnable;

D. if the person upon whom such writ is served has had the party in his control or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause and by what authority such transfer took place. The return shall be signed by the person making the same, and except where such person is a sworn public officer and makes his return in his official capacity, it shall be verified by oath.

History: Laws 1884, ch. 1, § 9; C.L. 1884, § 2020; C.L. 1897, § 2789; Code 1915, § 2597; C.S. 1929, § 63-109; 1941 Comp., § 25-1109; 1953 Comp., § 22-11-9.

ANNOTATIONS

When petitioner not restrained no release order may be made. — Where on habeas corpus there is nothing to contradict the return of the sheriff, showing that at the date of the petition the petitioner was not restrained of his liberty, an order releasing him from unlawful imprisonment may not be made. In re Brydon, 9 N.M. 647, 43 P. 691 (1889).

Law reviews. — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus §§ 135 to 140.

39A C.J.S. Habeas Corpus §§ 180 to 183.

44-1-10. [Petitioner to be produced; exception.]

The person or officer on whom the writ is served shall bring the body of the person in his custody, according to the command of such writ, except in the case of the sickness of such person, as hereinafter provided in this chapter.

History: Laws 1884, ch. 1, § 10; C.L. 1884, § 2021; C.L. 1897, § 2790; Code 1915, § 2598; C.S. 1929, § 63-110; 1941 Comp., § 25-1110; 1953 Comp., § 22-11-10.

ANNOTATIONS

Cross references. — For the procedure when petitioner is sick or infirm, see 44-1-26 NMSA 1978.

Compiler's notes. — The compilers of the 1915 Code substituted "hereinafter provided in this chapter" for "hereinafter provided." The term "this chapter" refers to ch. 51 of the 1915 Code, the provisions of which are presently compiled as 44-1-1 to 44-1-37 NMSA 1978.

Law reviews. — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus § 144.

39A C.J.S. Habeas Corpus § 185.

44-1-11. [Attachment for disobedience of writ; issuance; to whom directed; proceedings.]

If the person upon whom such writ is duly served refuses or neglects to obey the same, by producing the party named in such writ, and making a full and explicit return to every such writ within the time required by the provisions of this chapter, and no sufficient excuse is shown for such refusal or neglect, the officer before whom such writ is returnable, upon due proof of the service thereof, shall forthwith issue an attachment against such person, directed to the sheriff of any county in this state, and commanding him forthwith to apprehend such person and to bring him immediately before such officer, and on such person being so brought he shall be committed to close custody in the jail of the county in which such officer is, until he makes return to such writ and complies with any order that may be made by such officer in relation to the person for whose relief such writ was issued.

History: Laws 1884, ch. 1, § 11; C.L. 1884, § 2022; C.L. 1897, § 2791; Code 1915, § 2599; C.S. 1929, § 63-111; 1941 Comp., § 25-1111; 1953 Comp., § 22-11-11.

ANNOTATIONS

Meaning of "this chapter". — The term "this chapter" appeared in the original act, which was divided into three unnumbered divisions, to-wit: habeas corpus, §§ 1 to 36; mandamus, §§ 37 to 50; prohibition, §§ 51 to 56; and apparently referred to §§ 1 to 36, the operative provisions of which are compiled as 44-1-1 to 44-1-22, 44-1-25 to 44-1-37 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus §§ 176, 177.

39A C.J.S. Habeas Corpus § 187.

44-1-12. [Attachment against sheriff; place of detention.]

If a sheriff neglects to return such writ the attachment may be directed to any person designated therein, who shall have full power to execute the same, and such sheriff upon being brought up may be committed to the jail of any county other than his own.

History: Laws 1884, ch. 1, § 12; C.L. 1884, § 2023; C.L. 1897, § 2792; Code 1915, § 2600; C.S. 1929, § 63-112; 1941 Comp., § 25-1112; 1953 Comp., § 22-11-12.

44-1-13. [Precept for production of petitioner by officer executing attachment.]

The officer by whom any such attachment is issued may also at the same time or afterward issue a precept to the sheriff, or other person to whom such attachment was directed, commanding him to bring forthwith before such officers the party for whose benefit such writ was allowed, who shall thereafter remain in the custody of such sheriff or person until he is discharged, bailed or remanded, as such officer directs.

History: Laws 1884, ch. 1, § 13; C.L. 1884, § 2024; C.L. 1897, § 2793; Code 1915, § 2601; C.S. 1929, § 63-113; 1941 Comp., § 25-1113; 1953 Comp., § 22-11-13.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus § 145.

39A C.J.S. Habeas Corpus § 185.

44-1-14. [Hearing.]

The officer before whom such party is brought on such writ shall immediately after the return thereof, proceed to examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same was before commitment for any criminal charge or not.

History: Laws 1884, ch. 1, § 14; C.L. 1884, § 2025; C.L. 1897, § 2794; Code 1915, § 2602; C.S. 1929, § 63-114; 1941 Comp., § 25-1114; 1953 Comp., § 22-11-14.

ANNOTATIONS

Cross references. — For additional provisions governing hearings, see 44-1-24, 44-1-25 NMSA 1978.

Standard for imposing the sanction of granting a petition for writ of habeas corpus. — The standard for granting a petition for writ of habeas corpus without a response from the state requires a determination of whether the state's conduct reached the point of stubborn resistance to the court's orders that would justify such an extreme sanction. Quintana v. Bravo, 2013-NMSC-011, 299 P.3d 414.

The court's sanction for the state's delay in responding to a petition for writ of habeas corpus was not justified. — Where petitioner filed a petition for writ of habeas corpus to vacate jury verdicts convicting petitioner of several felonies, including first-degree murder, on the ground that petitioner was denied effective assistance of counsel; one of petitioner's trial counsel, who admitted by affidavit that the representation of petitioner was ineffective, was then working for the district attorney's office; because of the conflict of interest, the district attorney did not file a response to the petition and did not appear at motion hearings; the district attorney attempted to secure other counsel for the respondents; the district court was aware of the conflict and the confusion regarding whether an attorney from the attorney general's office or an attorney from a district attorney's office in another jurisdiction would represent the respondents; and the district court granted the petition based on the allegations in the petition and trial counsel's affidavit because the respondents had failed to timely file a response to the petition and to appear at scheduled motion hearings, refused to delay the hearing on the motion to rule on the pleadings, and subsequently denied a motion to reconsider, the conduct of the district attorney and the attorney general did not rise to the level of stubborn resistance to the district court's orders that would justify the extreme sanction of vacating petitioner's jury convictions without both considering a response from respondents and after having a full evidentiary hearing. Quintana v. Bravo, 2013-NMSC-011, 299 P.3d 414.

Pardoned prisoners not legally interested when warden enjoined from releasing them. — Where the superintendent (now warden) of the penitentiary has been enjoined from releasing prisoners pardoned by the governor, such persons are not legally interested in the question as to whether the superintendent has violated the injunction in allowing them to be arrested for another crime, but such question is between the superintendent and the court which issued the injunction. Ex parte Bustillos, 26 N.M. 449, 194 P. 886 (1920).

Law reviews. — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus §§ 142, 143.

Right to prove absence from demanding state or alibi on habeas corpus in extradition proceedings, 61 A.L.R. 715.

Bar of limitations as proper subject of investigation in extradition proceedings or in habeas corpus proceedings for release of one sought to be extradited, 77 A.L.R. 902.

Right to aid of counsel in application or hearing for habeas corpus, 162 A.L.R. 1922.

39A C.J.S. Habeas Corpus §§ 207 to 209.

44-1-15. [When petitioner will be discharged.]

If no legal cause is shown for such imprisonment or restraint, or for the continuation thereof, such officer shall discharge such party from the custody or restraint under which he is held.

History: Laws 1884, ch. 1, § 15; C.L. 1884, § 2026; C.L. 1897, § 2795; Code 1915, § 2603; C.S. 1929, § 63-115; 1941 Comp., § 25-1115; 1953 Comp., § 22-11-15.

ANNOTATIONS

Function of writ of habeas corpus is not to review record for errors of the trial court, and where the petition states no facts showing petitioner is unlawfully deprived of his liberty, it will be denied. Smith v. People, 71 N.M. 112, 376 P.2d 54 (1962).

No appeal lies from decision of district court in habeas corpus proceedings. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941).

Inability to pay support money negates sentence on habeas corpus. — Present ability to pay arrears of monthly sums allowed for support of children is essential to the validity of a contempt sentence to continue until payment, and where record shows that such sentence was imposed in absence of ability to pay, the sentence must be held for naught on habeas corpus. Ex parte Sedillo, 34 N.M. 98, 278 P. 202 (1929).

Law reviews. — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus § 156.

Right of state or public officer to appeal from an order in habeas corpus releasing one from custody, 10 A.L.R. 385, 30 A.L.R. 1322.

Arresting one who has been discharged on habeas corpus, 62 A.L.R. 462.

Right to appeal from conviction as affected by discharge on habeas corpus, 74 A.L.R. 641.

Discharge on habeas corpus after conviction as affecting claim or plea of former jeopardy, 97 A.L.R. 160.

39A C.J.S. Habeas Corpus § 228.

44-1-16. [When petitioner will be remanded to custody.]

The officer shall forthwith remand such party, if it appears that he is detained in custody, either:

A. by virtue of process issued by any court or judge of the United States in a case where such court or judge has exclusive jurisdiction; or

B. by virtue of the final judgment or decree of any competent court, or of any execution issued upon such judgment or decree; or

C. for any contempt, specially and plainly charged in the commitment by some court, officer or body having authority to commit for the contempt so charged; and

D. that the time during which such party may be legally detained has not expired.

History: Laws 1884, ch. 1, § 16; C.L. 1884, § 2027; C.L. 1897, § 2796; Code 1915, § 2604; C.S. 1929, § 63-116; 1941 Comp., § 25-1116; 1953 Comp., § 22-11-16.

ANNOTATIONS

Decision not by "competent" court when constitutional guarantees denied. — For a court to be competent, jurisdiction must be present, and that jurisdiction clearly may be lost. When certain constitutional guarantees are denied, overlooked or omitted, the conviction or sentence is not by a "competent" court. Orosco v. Cox, 75 N.M. 431, 405 P.2d 668 (1965).

Petitioner remanded if facts constituting contempt appear on petition's face. — If the facts required in the third subdivision (Subsection C) appear on the face of the petition, the motion to dismiss and remand should be allowed. In re Sloan, 5 N.M. 590, 25 P. 930 (1891).

Law reviews. — For article, "Prisoners Are People," see 10 Nat. Resources J. 869 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus § 157.

39A C.J.S. Habeas Corpus § 221.

44-1-17. [Causes for discharge of petitioner in custody under civil process.]

If it appears on the return that the prisoner is in custody by virtue of civil process of any court legally constituted, or issued by an officer in the course of judicial proceedings before him, authorized by law, such prisoner can only be discharged in one of the following cases:

A. when the jurisdiction of such court or officer has been exceeded either as to matter, place, sum or person;

B. where, though the original imprisonment was lawful, yet by some act, omission or event which has taken place afterward, the party is entitled to be discharged;

C. where the process is defective in some matter of substance required by law rendering such process void;

D. where the process, though in proper form, has been issued in a case not allowed by law;

E. where the person having the custody of the prisoner under such process is not the person empowered by law to detain him; or

F. where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law.

History: Laws 1884, ch. 1, § 17; C.L. 1884, § 2028; C.L. 1897, § 2797; Code 1915, § 2605; C.S. 1929, § 63-117; 1941 Comp., § 25-1117; 1953 Comp., § 22-11-17.

ANNOTATIONS

No constitutional right invaded if trial's total result was fair. — In determining whether the deprivation of constitutional rights amounts to a denial of due process the inquiry on habeas corpus is directed to a review of the entire proceedings, and if the total result was the granting to accused of a fair and deliberate trial, then no constitutional right has been invaded, and the proceedings will not be disturbed. Orosco v. Cox, 75 N.M. 431, 405 P.2d 668 (1965).

In habeas corpus proceeding supreme court may receive evidence outside record to establish the absence or loss of jurisdiction through denial of any of the rights guaranteed to a prisoner at the bar by either the United States or New Mexico constitutions. Orosco v. Cox, 75 N.M. 431, 405 P.2d 668 (1965).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus § 90.

Habeas corpus to test constitutionality of ordinance under which petitioner is held, 32 A.L.R. 1054.

Habeas corpus in case of sentence which is excessive because imposing both fine and imprisonment, 49 A.L.R. 494.

Power to grant writ of habeas corpus pending appeal from conviction, 52 A.L.R. 876.

Habeas corpus as remedy for delay in bringing accused to trial or to retrial after reversal, 58 A.L.R. 1510.

Illegal or erroneous sentence as ground for habeas corpus, 76 A.L.R. 468.

Habeas corpus as remedy where one is convicted, upon plea of guilty or after trial, of offense other than one charged in indictment or information, 154 A.L.R. 1135.

Mistreatment of prisoner lawfully in custody as ground for habeas corpus, 155 A.L.R. 145.

39 C.J.S. Habeas Corpus § 110.

44-1-18. [Legality or justice of judgment or execution.]

But no officer on the return of any habeas corpus can inquire into the legality or justice of any judgment, decree or execution specified in Section 44-1-16 NMSA 1978.

History: Laws 1884, ch. 1, § 18; C.L. 1884, § 2029; C.L. 1897, § 2798; Code 1915, § 2606; C.S. 1929, § 63-118; 1941 Comp., § 25-1118; 1953 Comp., § 22-11-18.

ANNOTATIONS

Legality of imprisonment does not rest upon mittimus, but upon judgment, and a prisoner who has been legally and properly sentenced to prison cannot obtain his discharge simply because there is an imperfection, or error, in the mittimus. Shankle v. Woodruff, 64 N.M. 88, 324 P.2d 1017 (1958).

Valid judgment is not nullified by flaws in the commitment. Shankle v. Woodruff, 64 N.M. 88, 324 P.2d 1017 (1958).

Objections to information not grounds for release. — Petitioner's objections to an information, if valid and the error reserved, might make the basis of a timely appeal but are not grounds for release on habeas corpus. Shankle v. Woodruff, 64 N.M. 88, 324 P.2d 1017 (1958).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus § 64.

39 C.J.S. Habeas Corpus § 81.

44-1-19. [Petitioner legally committed or guilty of offense; release on bail.]

If it appears that the party has been legally committed for any criminal offense, or if he appears, by the testimony offered with the return upon the hearing thereof, to be guilty of such an offense, although the commitment is irregular, the officer before whom

such party is brought shall proceed to let such party to bail, if the case be bailable and good bail is offered, or if not, shall forthwith remand such party.

History: Laws 1884, ch. 1, § 19; C.L. 1884, § 2030; C.L. 1897, § 2799; Code 1915, § 2607; C.S. 1929, § 63-119; 1941 Comp., § 25-1119; 1953 Comp., § 22-11-19.

ANNOTATIONS

Cross references. — For habeas corpus proceedings to obtain release on bail, see 44-1-23, 44-1-24 NMSA 1978.

Petitioner remanded for new sentence where illegality is void sentence. — Where illegality of restraint complained of in habeas corpus is imposition of void sentence on legal conviction, petitioner should be remanded or detained for new sentence. Jordan v. Swope, 36 N.M. 84, 8 P.2d 788 (1932).

This section does not require granting of bail in every case. 1974 Op. Att'y Gen. No. 74-38.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus § 64.

39 C.J.S. Habeas Corpus § 36.

44-1-20. [Decision in other cases.]

In other cases the party shall be placed in custody of the person legally entitled thereto, or if no one is so entitled, he shall be discharged.

History: Laws 1884, ch. 1, § 20; C.L. 1884, § 2031; C.L. 1897, § 2800; Code 1915, § 2608; C.S. 1929, § 63-120; 1941 Comp., § 25-1120; 1953 Comp., § 22-11-20.

ANNOTATIONS

Petitioner remanded for new sentence where illegality is void sentence. — Where illegality of restraint complained of in habeas corpus is imposition of void sentence on legal conviction, petitioner should be remanded or detained for new sentence. Jordan v. Swope, 36 N.M. 84, 8 P.2d 788 (1932).

44-1-21. [Custody of petitioner pending decision.]

Until judgment is given upon the action, the officer before whom such party is brought may either commit such party to the custody of the sheriff of the county in which such officer is, or place him in such care or under such custody as his age and other circumstances require.

History: Laws 1884, ch. 1, § 21; C.L. 1884, § 2032; C.L. 1897, § 2801; Code 1915, § 2609; C.S. 1929, § 63-121; 1941 Comp., § 25-1121; 1953 Comp., § 22-11-21.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus § 145.

39A C.J.S. Habeas Corpus § 185.

44-1-22. [Notice of hearing.]

In criminal cases, notice of the time and place at which the writ is made returnable shall be given to the district attorney, if he is within the county; in other cases like notice shall be given to any person interested in continuing the custody or restraint of the party seeking the aid of said writ.

History: Laws 1884, ch. 1, § 22; C.L. 1884, § 2033; C.L. 1897, § 2802; Code 1915, § 2610; C.S. 1929, § 63-122; 1941 Comp., § 25-1122; 1953 Comp., § 22-11-22.

ANNOTATIONS

Law reviews. — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39A C.J.S. Habeas Corpus § 166.

44-1-23. [Bail proceedings; authorization of habeas corpus; committing magistrate's proceedings to be reviewed.]

Hereafter all persons to whom bail has been denied or who are confined for failure to give bail, may have the benefit of a writ of habeas corpus for the purpose of being admitted to bail or having the bail reduced, and the court or judge shall, upon habeas corpus, review the proceedings or action of a committing magistrate.

History: Laws 1889, ch. 29, § 1; C.L. 1897, § 2803; Code 1915, § 2611; C.S. 1929, § 63-123; 1941 Comp., § 25-1123; 1953 Comp., § 22-11-23.

ANNOTATIONS

Cross references. — For release on bail, *see* 44-1-19 NMSA 1978.

For bail generally, *see* Rule 5-401 NMRA.

Compiler's notes. — This section, as enacted, contained at the beginning a clause repealing 2034, 1884 C.L. The clause was omitted by the compilers of the 1915 Code.

Former statute prevented bail in capital case where proof evident. — Supreme court did not find it necessary to determine whether the constitution prohibited bail to persons coming within the exception set forth in N.M. Const., art. II, § 13, concerning persons accused of capital offenses, when proof is evident or presumption great, because 41-4-5, 1953 Comp. (since repealed) expressly prohibited the granting of bail to such defendants. Therefore, magistrate had no discretion to allow bail, since his determination was that, as to the defendants, the proof was evident or the presumption great. Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968).

Bail not mandatory after issuance of warrant in extradition case. — This section does not require the granting of bail in every case nor does it require bail after issuance of a governor's warrant in an extradition case. 1974 Op. Att'y Gen. No. 74-38.

Law reviews. — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus §§ 40 to 43.

Bail pending appeal in habeas corpus, 63 A.L.R. 1460, 143 A.L.R. 1354.

39 C.J.S. Habeas Corpus § 111.

44-1-24. [Certiorari to committing magistrate; transcript; examination of case de novo; decision.]

When an application is made before any authority authorized by law to issue such writs of habeas corpus it shall be the duty of such officers to issue a writ of certiorari commanding the committing magistrate forthwith to send to said officers a full and complete transcript of all his proceedings had thereof, and the said officer upon the return of such writ shall proceed to examine the case de novo and either commit to jail, discharge or recognize such person to appear before the district court as the case may require.

History: Laws 1889, ch. 29, § 2; C.L. 1897, § 2804; Code 1915, § 2612; C.S. 1929, § 63-124; 1941 Comp., § 25-1124; 1953 Comp., § 22-11-24.

44-1-25. [Pleading by petitioner after return; summary hearing.]

The party brought before any such officer on the return of any writ of habeas corpus, may deny any of the material facts set forth in the return, or allege any fact to show, either that his imprisonment or detention is unlawful, or that he is entitled to his discharge, which allegations or denials shall be on oath; and thereupon such officer shall proceed in a summary way to hear such allegations and proofs as are legally produced in support of such imprisonment or detention or against the same, and to dispose of such party as justice requires.

History: Laws 1884, ch. 1, § 24; C.L. 1884, § 2035; C.L. 1897, § 2805; Code 1915, § 2613; C.S. 1929, § 63-125; 1941 Comp., § 25-1125, 1953 Comp., § 22-11-25.

ANNOTATIONS

Petitioner may allege and show void character of conviction. — When a return to writ asserts that petitioner is held under a commitment issued pursuant to a judgment of a district court, the petitioner may deny the facts alleged in the return, and himself allege and show facts to establish the void character of his conviction and illegality of his detention. Orosco v. Cox, 75 N.M. 431, 405 P.2d 668 (1965).

In habeas corpus proceeding supreme court may receive evidence outside the record to establish the absence or loss of jurisdiction through denial of any of the rights guaranteed to a prisoner at the bar by either the United States or New Mexico constitutions. Orosco v. Cox, 75 N.M. 431, 405 P.2d 668 (1965).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus § 142.

39A C.J.S. Habeas Corpus § 188.

44-1-26. [Procedure when petitioner is sick or infirm.]

Whenever from the sickness or infirmity of the person directed to be produced by any writ of habeas corpus such person cannot, without danger, be brought before the officer before whom the suit is made returnable, the party in whose custody he is may state the fact in his return to the writ, verifying the same by his oath; and if such officer is satisfied of the truth of such allegation and the return is otherwise sufficient, he shall proceed to decide upon such return and to dispose of the matter; and if it appears that the person detained is illegally imprisoned, confined or restrained of his liberty, the officer shall order those having such person in their custody to discharge him forthwith; and if it appears that such person is legally detained, imprisoned and confined, and is not entitled to be bailed, such officer shall dismiss the proceedings.

History: Laws 1884, ch. 1, § 25; C.L. 1884, § 2036; C.L. 1897, § 2806; Code 1915, § 2614; C.S. 1929, § 63-126; 1941 Comp., § 25-1126; 1953 Comp., § 22-11-26.

44-1-27. [Disobedience of order for discharge; attachment; damages recoverable.]

Obedience to any order for the discharge of any prisoner, granted pursuant to the provisions of this chapter, may be enforced by the officer issuing such writ or granting such order, by attachment, in the same manner as herein provided for a neglect to make a return to a writ of habeas corpus, and the person guilty of such disobedience shall forfeit to the party aggrieved, one thousand dollars [($1,000)] in addition to any special damages such party may have sustained.

History: Laws 1884, ch. 1, § 26; C.L. 1884, § 2037; C.L. 1897, § 2807; Code 1915, § 2615; C.S. 1929, § 63-127; 1941 Comp., § 25-1127; 1953 Comp., § 22-11-27.

ANNOTATIONS

Meaning of "this chapter". — The term "this chapter" appeared in the original act, which was divided into three unnumbered divisions, to-wit: habeas corpus, §§ 1 to 36; mandamus, §§ 37 to 50; prohibition, §§ 51 to 56; and apparently referred to §§ 1 to 36, the operative provisions of which are compiled as 44-1-1 to 44-1-22, 44-1-25 to 44-1-37 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus §§ 176, 177.

Liability for statutory penalty of judge, court, administrative officer or other custodian of person, in connection with habeas corpus proceedings, 84 A.L.R. 807.

39A C.J.S. Habeas Corpus § 187.

44-1-28. [Detention for same offense after discharge on habeas corpus prohibited; when permissible.]

No person who has been discharged upon a habeas corpus shall be again imprisoned or restrained for the same cause, unless indicted therefor, convicted thereof or committed for want of bail by some court of record having jurisdiction of the cause; or unless after a discharge for a defect of proof or for some material defect in the commitment in a criminal case, he is again arrested on sufficient proof and committed by legal process.

History: Laws 1884, ch. 1, § 27; C.L. 1884, § 2038; C.L. 1897, § 2808; Code 1915, § 2616; C.S. 1929, § 63-128; 1941 Comp., § 25-1128; 1953 Comp., § 22-11-28.

ANNOTATIONS

Civil res judicata limitations apply to criminal cases. — The doctrine of res judicata, as applied to criminal cases, is subject to the same limitations as apply in civil cases. State v. Nance, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Judgment res judicata to issues necessary to determine detention's legality. — An order or judgment discharging one in habeas corpus is conclusive as to the illegality of the detention or imprisonment and is res judicata of those issues of law and fact necessary to the determination of the legality of the detention. State v. Nance, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Release by writ does not exonerate from charges. — When defendants obtained a release from custody by the writ, they were not exonerated from the charges for which they were sentenced. The only effect of the release was to set aside their pleas and the sentence. They may then be again proceeded against as though there has been no prior proceedings. State v. Nance, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Other findings gratuitous when release based upon specific ground. — Where petitioners were successful in the habeas corpus proceeding because the court found that they had not been afforded effective counsel at trial, any finding that their confessions were involuntary was gratuitous and not necessary to the decision, and therefore not res judicata. State v. Nance, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

"Former jeopardy" clause of constitution does not preclude a retrial of a defendant whose sentence is set aside because of an error in the proceedings leading to the sentence or conviction. This is equally true where the conviction is overturned on collateral rather than direct attack, by petition for habeas corpus, for example. State v. Nance, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Retrial after release on writ not double jeopardy. — Where defendant served more than a year for prior conviction of larceny before being released on habeas corpus due to lack of jurisdiction, subsequent trial for same offense did not constitute double jeopardy. State v. Paris, 76 N.M. 291, 414 P.2d 512 (1966).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Arresting one who has been discharged on habeas corpus or released on bail, 62 A.L.R. 462.

44-1-29. [Concealment or transfer of prisoner to avoid writ; forfeiture.]

If anyone, who has in his custody, or under his control, a person entitled to a writ of habeas corpus, whether a writ has been issued or not, transfers such prisoner to the custody, or places him under the power or control of another person, or conceals him, or changes the place of his confinement, with intent to elude the service of such writ, or to avoid the effect thereof, the person so offending shall forfeit to the party aggrieved thereby the sum of four hundred dollars [($400)], to be recovered in a civil action.

History: Laws 1884, ch. 1, § 28; C.L. 1884, § 2039; C.L. 1897, § 2809; Code 1915, § 2617; C.S. 1929, § 63-129; 1941 Comp., § 25-1129; 1953 Comp., § 22-11-29.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus §§ 176, 177.

Liability of judge, court administrative officer or other custodian of person for whose release the writ is sought, in connection with habeas corpus proceedings, 84 A.L.R. 807.

39A C.J.S. Habeas Corpus § 187.

44-1-30. [Detention officer refusing to furnish copies; forfeiture.]

Any officer, or other person, refusing to deliver a copy of any order, warrant, process or other authority, by which he detains any person, to anyone who demands such copy and tenders the fees thereof, shall forfeit two hundred dollars [($200)] to the person so detained.

History: Laws 1884, ch. 1, § 29; C.L. 1884, § 2040; C.L. 1897, § 2810; Code 1915, § 2618; C.S. 1929, § 63-130; 1941 Comp., § 25-1130; 1953 Comp., § 22-11-30.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus §§ 176, 177.

Liability of judge, court administrative officer or other custodian of person for whose release the writ is sought, in connection with habeas corpus proceedings, 84 A.L.R. 807.

39A C.J.S. Habeas Corpus § 187.

44-1-31. [When writ returnable; seal.]

Every writ of habeas corpus may be made returnable at a day certain, or forthwith, as the case may require, and shall be under the seal of the court.

History: Laws 1884, ch. 1, § 30; C.L. 1884, § 2041; C.L. 1897, § 2811; Code 1915, § 2619; C.S. 1929, § 63-131; 1941 Comp., § 25-1131; 1953 Comp., § 22-11-31.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus § 136.

39A C.J.S. Habeas Corpus § 180.

44-1-32. [Who may serve writ; tender of fees; bond for costs and restoration of prisoner.]

It can only be served by an elector of this state, and the service thereof shall not be deemed complete unless the party serving the same tenders to the person in whose custody the prisoner is, if such person is a sheriff, constable or marshal, the fees allowed by law for bringing up such prisoner. The officer granting the writ may, in his discretion, require a bond in a penalty not exceeding one thousand dollars [($1,000)], with sufficient sureties, conditioned that the obligators will pay all costs and expenses of the proceeding, and the reasonable charges of restoring the prisoner to the person from whose custody he was taken, if he is remanded. Such bond shall run to the sheriff of the county and be filed in the office of the clerk of the court from which the writ issues.

History: Laws 1884, ch. 1, § 31; C.L. 1884, § 2042; C.L. 1897, § 2812; Code 1915, § 2620; C.S. 1929, § 63-132; 1941 Comp., § 25-1132; 1953 Comp., § 22-11-32.

ANNOTATIONS

Cross references. — For sheriff's fees for producing prisoner, *see* 44-1-37 NMSA 1978.

Intention that petitioner either post bond or pay costs. — The evident intention of the legislature under this section is that the petitioner might advance the costs to the person in charge of the prisoner or that the officer might require bond for the payment of all costs. In re Fullen, 17 N.M. 405, 132 P. 1137 (1913).

Taxing of costs done pursuant to section. — The taxing of costs under the terms of the bond, by the supreme court, is not an exercise of discretion, but is pursuant to this section. In re Fullen, 17 N.M. 405, 132 P. 1137 (1913).

Law reviews. — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus §§ 133, 165 to 167.

39A C.J.S. Habeas Corpus §§ 177, 235.

44-1-33. [Service by delivery to custodian or person to whom writ is directed.]

Every writ of habeas corpus issued pursuant to this chapter may be served by delivering the same to the person to whom it is directed. If he cannot be found, it may be served by being left at the jail or other place in which the prisoner is confined, with any under officer or other person of proper age having charge for the time of such prisoner.

History: Laws 1884, ch. 1, § 32; C.L. 1884, § 2043; C.L. 1897, § 2813; Code 1915, § 2621; C.S. 1929, § 63-133; 1941 Comp., § 25-1133; 1953 Comp., § 22-11-33.

ANNOTATIONS

Meaning of "this chapter". — The term "this chapter" appeared in the original act, which was divided into three unnumbered divisions, to-wit: habeas corpus, §§ 1 to 36; mandamus, §§ 37 to 50; prohibition, §§ 51 to 56; and apparently referred to §§ 1 to 36, the operative provisions of which are compiled as 44-1-1 to 44-1-22, 44-1-25 to 44-1-37 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39A C.J.S. Habeas Corpus § 177.

44-1-34. [Service by posting.]

If the person on whom the writ ought to be served, conceals himself, or refuses admittance to the party attempting to serve the same, it may be served by affixing the same in some conspicuous place on the outside, either of his dwelling house or of the place where the party is confined.

History: Laws 1884, ch. 1, § 33; C.L. 1884, § 2044; C.L. 1897, § 2814; Code 1915, § 2622; C.S. 1929, § 63-134; 1941 Comp., § 25-1134; 1953 Comp., § 22-11-34.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39A C.J.S. Habeas Corpus § 177.

44-1-35. [Time allowed for making return and producing prisoner.]

If the writ is returnable at a certain day, such return shall be made, and such prisoner produced at the time and place specified therein; if he is returnable forthwith, and the place is within twenty miles of the place of service, such return shall be made and such prisoner produced within twenty-four hours, and the like time shall be allowed for every additional twenty miles.

History: Laws 1884, ch. 1, § 34; C.L. 1884, § 2045; C.L. 1897, § 2815; Code 1915, § 2623; C.S. 1929, § 63-135; 1941 Comp., § 25-1135; 1953 Comp., § 22-11-35.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus § 136.

39A C.J.S. Habeas Corpus § 180.

44-1-36. [Compelling attendance of prisoner for trial or as witness.]

Nothing contained in this chapter shall be construed to restrain the power of any court to issue a writ of habeas corpus when necessary to bring before them any prisoner for trial, in any criminal case lawfully pending in the same court, or to bring any

prisoner to be examined as a witness in any action or proceeding, civil or criminal, pending in such court, when they think the personal attendance and examination of the witness necessary for the attainment of justice.

History: Laws 1884, ch. 1, § 35; C.L. 1884, § 2046; C.L. 1897, § 2816; Code 1915, § 2624; C.S. 1929, § 63-136; 1941 Comp., § 25-1136; 1953 Comp., § 22-11-36.

ANNOTATIONS

Meaning of "this chapter". — The term "this chapter" appeared in the original act, which was divided into three unnumbered divisions, to-wit: habeas corpus, §§ 1 to 36; mandamus, §§ 37 to 50; prohibition, §§ 51 to 56; and apparently referred to §§ 1 to 36, the operative provisions of which are compiled as 44-1-1 to 44-1-22, 44-1-25 to 44-1-37 NMSA 1978.

Law reviews. — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

44-1-37. [Sheriff's fees for producing prisoner.]

The sheriff or person who shall be required to bring up a person on habeas corpus, if the person be held by virtue of any legal process directed to such person as an officer, shall be entitled to the same fees and allowances as are allowed to sheriffs for removing prisoners in other cases.

History: Laws 1884, ch. 1, § 36; C.L. 1884, § 2047; C.L. 1897, § 2817; Code 1915, § 2625; C.S. 1929, § 63-137; 1941 Comp., § 25-1137; 1953 Comp., § 22-11-37.

ANNOTATIONS

Cross references. — For county officers not receiving, for their own use, fees in addition to salary, *see* N.M. Const., art. X, § 1 and 4-44-21 NMSA 1978.

For the tender of fees to person having custody, *see* 44-1-32 NMSA 1978.

For sheriff's expenses generally, *see* 4-41-18, 4-41-19, 4-44-18 NMSA 1978.

44-1-38. [Federal court proceedings; payment of costs, fees and expenses by state penitentiary.]

If the petition for the writ is filed in any federal court, all the reasonably necessary costs, fees and expenses incurred or paid by the respondent shall be paid by the penitentiary of New Mexico. The budget of the penitentiary shall include an item for the anticipated expenses of habeas corpus proceedings. If budgeted funds shall not be sufficient to pay the costs and expenses that will arise, an emergency allowance from

the state court fund shall be allowed upon application of the warden of the penitentiary to the state board of finance.

History: 1953 Comp., § 22-11-41, enacted by Laws 1963, ch. 178, § 4.

ANNOTATIONS

Law reviews. — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

ARTICLE 2
Mandamus

44-2-1. [Regulation of mandamus.]

The writ of mandamus is regulated as in this chapter prescribed.

History: Laws 1884, ch. 1, § 37; C.L. 1884, § 1992; C.L. 1897, § 2760; Code 1915, § 3411; C.S. 1929, § 86-101; 1941 Comp., § 26-101; 1953 Comp., § 22-12-1.

ANNOTATIONS

Meaning of "this chapter". — The original act, Laws 1884, ch. 1, was divided into three unnumbered divisions, habeas corpus, §§ 1 to 36; mandamus, §§ 37 to 50; and prohibition, §§ 51 to 56. The term "this chapter" appeared in the original act and apparently referred to the division containing §§ 37 to 50, presently compiled as 44-2-1 to 44-2-13 NMSA 1978.

Section limits and defines court's mandamus power. — Under and by virtue of this section, the power of the court in a mandamus proceeding is limited and defined. Bd. of Comm'rs v. Dist. Court, 29 N.M. 244, 223 P. 516 (1924).

Denomination of pleading irrelevant since allegations and relief determine nature. — It matters not what the pleading initiating the proceeding may be denominated. If in truth is discloses by its allegations and the relief sought that it is an action in mandamus, it will be so treated. Laumback v. Bd. of Cnty. Comm'rs, 60 N.M. 226, 290 P.2d 1067 (1955).

Formal defects in petition for writ waived. — Because the motor vehicle division appeared generally in the case and subsequently did not answer or appear at any hearing, the division waived any formal defects in the petition for writ of mandamus. Barreras v. N.M. Motor Vehicle Div., 2005-NMCA-055, 137 N.M. 435, 112 P.3d 296.

Law reviews. — For article, "Mandamus in New Mexico," see 4 N.M. L. Rev. 155 (1974).

For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

For note, "Mandamus Proceedings Against Public Officials: State of New Mexico ex rel. Bird v. Apodaca," see 9 N.M.L. Rev. 195 (1978-79).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Mandamus § 1 et seq.

Allowance of attorney's fees in mandamus proceedings, 34 A.L.R.4th 457.

55 C.J.S. Mandamus § 1 et seq.

44-2-2. [District courts open at all times for issuance of writs.]

For the purpose of hearing application for, and issuing writs of mandamus, the district courts shall be regarded as open at all times, wherever the judge of such court may be within the state.

History: Laws 1884, ch. 1, § 50; C.L. 1884, § 2005; C.L. 1897, § 2774; Code 1915, § 3412; C.S. 1929, § 86-102; 1941 Comp., § 26-102; 1953 Comp., § 22-12-2.

ANNOTATIONS

Writ may issue in vacation. — A judge of a district court may issue a peremptory writ of mandamus in vacation. Delgado v. Chavez, 5 N.M. 646, 25 P. 948, aff'd, 140 U.S. 586, 11 S. Ct. 874, 35 L. Ed. 578 (1891).

44-2-3. [Exclusive original jurisdiction; district and supreme courts.]

The district court has exclusive original jurisdiction in all cases of mandamus, except where such writ is to be directed to a district court or a judge thereof in his official capacity, in which case the supreme court has exclusive original jurisdiction, and in such cases the supreme court or a judge thereof shall first make a rule, returnable in term, that such district court or judge thereof, show cause before the court why a peremptory writ of mandamus should not issue, and upon the return day of such rule such district court or judge may show cause against the rule by affidavit or record, evidence, and upon the hearing thereof, the supreme court shall award a peremptory writ, or dismiss the rule. In case of emergency, a judge of the supreme court, at the time of making the rule to show cause, may also appoint a special term of the court for hearing the motion, and at which the rule shall be made returnable.

History: Laws 1884, ch. 1, § 48; C.L. 1884, § 2003; C.L. 1897, § 2771; Code 1915, § 3423; C.S. 1929, § 86-113; 1941 Comp., § 26-103; 1953 Comp., § 22-12-3.

ANNOTATIONS

Cross references. — For the constitutional provision granting the supreme court original jurisdiction in mandamus, against state offices, boards and commissions, and power to issue writs of mandamus for the complete exercise of its jurisdiction, see N.M. Const., art. VI, § 3.

As to the terms, sessions and recesses of the supreme court, see N.M. Const., art. VI, § 7.

As to the power of the district courts to issue mandamus, see N.M. Const., art. VI, § 13.

As to extraordinary writs in the supreme court, see Rule 12-504 NMRA.

Supreme Court of New Mexico exercises constitutionally invested original jurisdiction in mandamus against all state officers, boards and commissions. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

Issuance of mandamus by the Supreme Court. — The exercise of the Supreme Court's original jurisdiction in mandamus may be appropriate when the petitioner presents a purely legal question concerning the non-discretionary duty of a government official that implicates fundamental constitutional questions of great public importance, can be answered on the basis of virtually undisputed facts, and calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal. State ex rel. Sandel v. N.M. Public Utility Comm'n, 1999-NMSC-019, 127 N.M. 272, 980 P.2d 55; In re. Adjustments to Franchise Fees Required by Electric Utility Industry Restructuring Act of 1999, 2000-NMSC-035, 129 N.M. 78, 14 P.3d 525.

Original proceeding in mandamus. — A mandamus petition for an order precluding the governor from implementing compacts and revenue-sharing agreements with Indian tribes which would permit gaming on Indian lands pursuant to the federal Indian Gaming Regulatory Act was properly brought before the supreme court in an original proceeding. State ex rel. Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995).

Jurisdiction given supreme court by this section is limited by Sections 44-2-4 and 44-2-5 NMSA 1978. State ex rel. Sweeney v. Second Judicial Dist., 17 N.M. 282, 127 P. 23 (1912).

Judgment of district court in mandamus proceedings may be modified on appeal. Territory ex rel. Coler v. Bd. of County Comm'rs, 14 N.M. 134, 89 P. 252 (1907), aff'd, 215 U.S. 296, 30 S. Ct. 111, 54 L. Ed. 202 (1909).

Law reviews. — For article, "Mandamus in New Mexico," see 4 N.M. L. Rev. 155 (1974).

For note, "Mandamus Proceedings Against Public Officials: State of New Mexico ex rel. Bird v. Apodaca," see 9 N.M.L. Rev. 195 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Mandamus §§ 12 to 15, 21 to 26, 432, 433.

Discretion of appellate court to refuse exercise of its original jurisdiction to issue writs of mandamus, 165 A.L.R. 1431.

55 C.J.S. Mandamus §§ 240, 272 to 274.

44-2-4. [Purpose of writ; judicial discretion not controlled.]

It may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; but though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion.

History: Laws 1884, ch. 1, § 38; C.L. 1884, § 1993; C.L. 1897, § 2761; Code 1915, § 3413; C.S. 1929, § 86-103; 1941 Comp., § 26-104; 1953 Comp., § 22-12-4.

ANNOTATIONS

Cross references. — As to the court's issuance of the writ while in vacation, see 44-2-2 NMSA 1978.

For the supreme court's jurisdiction and authority with respect to the writ of mandamus, see N.M. Const., art. VI, § 3 and notes thereto.

For appeal of refused voter registration, see 1-4-21 NMSA 1978.

As to mandamus to compel canvass by county canvassing board, see 1-13-12 NMSA 1978.

For the use of the writ to compel recounts or rechecks of election results, see 1-14-21 NMSA 1978.

As to use of writ to compel secretary of state to examine referendum, see 1-17-3 NMSA 1978.

As to right of bond holders to compel tax levy for courthouse, jail or bridge bonds, see 4-49-21 NMSA 1978.

As to use of writ to compel compliance with the Subdivision Act, see 47-6-26 NMSA 1978.

For the right of an employee to use writ to compel the director of the environmental improvement division to initiate emergency procedures pursuant to the Occupational Health and Safety Act, see 50-9-14 NMSA 1978.

As to mandamus not being permitted to prevent a finding suspending or revoking a liquor license, see 60-6C-6 NMSA 1978.

As to use of writ by and against public service commission, see 62-12-1, 62-12-2 NMSA 1978.

As to conservancy districts enforcing regulations by use of writ, see 73-14-43, 73-17-9 NMSA 1978.

I. GENERAL CONSIDERATION.

Mandamus involving a suit pending in another court. — A district court is not uniformly required to deny a petition for mandamus out of deference to a suit that is pending before another district court. Rather, the district court, in exercising its discretion, should take into account the similarities of parties and issues and consider whether the district court first having jurisdiction over the matter is properly situated to settle the whole controversy and address the rights of the respective parties. Fastbucks of Roswell, N.M., LLC v. King, 2013-NMCA-008, 294 P.3d 1287.

Where the attorney general filed suit against defendants in the first district court alleging that defendants' lending practices and consumer loans were unconscionable under common law and the Unfair Practices Act, Section 57-12-1 NMSA 1978 et seq.; defendants filed a petition for writ of mandamus against the attorney general in the fifth district court to prohibit the attorney general from pursuing the first district court lawsuit on the grounds that defendants' loans complied with the Small Loan Act, Sections 58-15-1 NMSA 1978 et seq., and that the attorney general was acting beyond the attorney general's statutory and constitutional power in bringing the first district court lawsuit; the fifth district court had jurisdiction to consider the mandamus petition and venue was proper in the fifth district court; defendants had the opportunity to raise the arguments raised in the mandamus petition in their defense to the first district court lawsuit; and the fifth district court dismissed the mandamus petition on the grounds that the writ of mandamus would intrude on the first district court's jurisdiction and that the first district court provided an adequate forum for defendants to raise their challenges to the attorney general's powers, the fifth district court did not abuse its discretion in denying the petition for mandamus. Fastbucks of Roswell, N.M., LLC v. King, 2013-NMCA-008, 294 P.3d 1287.

Writ enforces only clear legal rights. — It is a well-established doctrine in the law relating to mandamus that only clear legal rights are subject to enforcement by the writ. Schreiber v. Baca, 58 N.M. 766, 276 P.2d 902 (1954).

Act beyond power or dependent on nonparty's will not required. — The writ of mandamus will not require the performance of an act beyond the power of the respondent or dependent upon the will of a third person not a party to the suit. Territory ex rel. Lester v. Suddith, 15 N.M. 728, 110 P. 1038 (1910).

Not issued when no reason to suppose noncompliance with order. — Where the warden who was sought to be compelled by writ had not appealed and there was no claim that he was not bound by the trial court's decision, the supreme court had no reason to suppose that he would not comply with it, and declined to assume he would not, and thus, defendant had suffered no prejudice by the trial court's denial of the writ, nor was prejudice to him presently threatened. Apodaca v. Rodriguez, 84 N.M. 338, 503 P.2d 318 (1972).

Will issue if governor exceeds constitutional authority. — The exercise of the veto power requires judgment and discretion on the part of the governor and he cannot be compelled by the legislature or by this court to exercise this power or to exercise it in a particular manner. However, the manner in which the governor exercises the power is not beyond judicial review or judicial control. When the manner in which it is exercised is beyond the governor's constitutional authority, mandamus is a proper proceeding in which to question not only the constitutionality of legislative enactments, but also the constitutionality of vetoes or attempted vetoes by the governor. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

When administrative board exceeds its jurisdiction. — Generally mandamus will not lie to control the discretion of an administrative board. But an exception to the general rule is recognized where the administrative board has acted unlawfully or wholly outside its jurisdiction or authority, or where it had abused its discretion. Sanderson v. N. M. State Racing Comm'n, 80 N.M. 200, 453 P.2d 370 (1969).

Denomination of pleading irrelevant since allegations and relief determine nature. — It matters not what the pleading initiating the proceeding may be denominated. If in truth it discloses by its allegations and the relief sought that it is an action in mandamus, it will be so treated. Laumback v. Bd. of County Comm'rs, 60 N.M. 226, 290 P.2d 1067 (1955).

If prohibition does not lie on facts then neither does mandamus. — Relator sought by writ of prohibition to restrain the district judge from granting a new trial in a workmen's compensation action on grounds of lack of jurisdiction under the act, and a motion to dismiss was sustained, under the same facts where prohibition will not lie, mandamus will not lie. State ex rel. Gallegos v. MacPherson, 63 N.M. 133, 314 P.2d 891 (1957).

If no jurisdictional question or injustice then writ not issued. — Where there was no jurisdictional question presented nor any showing that grave injustice would result if the case proceeded to trial, the matter was not one calling for the writ; and as the alternative writ of prohibition had been improvidently issued, it was thereby discharged. Baca v. Burks, 81 N.M. 376, 467 P.2d 392 (1970).

Pro se petitions. — Pro se petitions are regarded with a tolerant eye. Courts will consider a petition if the essential elements prerequisite to the granting of the relief sought can be found or reasonably inferred. Martinez v. State, 110 N.M. 357, 796 P.2d 250 (Ct. App. 1990).

II. PURPOSE OF SECTION.

A. IN GENERAL.

Mandamus is a summary and specific remedy to enforce performance of a duty incident to an existing right, in cases in which, without such appropriate redress, serious injustice would occur. It is a recognized process to maintain the prima facie title to an office, and it is not within its purview to determine the legality of such claim. Conklin v. Cunningham, 7 N.M. 445, 38 P. 170 (1894).

For mandamus to lie there must be clear legal right sought to be enforced, and where college professor's claimed tenure was not as a result of a positive provision of law, no such clear legal right existed. Lease v. Bd. of Regents, 83 N.M. 781, 498 P.2d 310 (1972).

Purpose of mandamus is to compel performance of ministerial duty which one charged with its performance has refused to perform. State ex rel. Reynolds v. Bd. of Cnty. Comm'rs, 71 N.M. 194, 376 P.2d 976 (1962).

Rights may not be adjudicated between parties by mandamus. — It is only a method of enforcing an existing right. State ex rel. State Hwy. Comm'n v. Quesenberry, 72 N.M. 291, 383 P.2d 255 (1963).

Writ only lies where duty clear and indisputable. — Mandamus lies to compel the performance of a statutory duty only when it is clear and indisputable. Regents of Agric. Coll. v. Vaughn, 12 N.M. 333, 78 P. 51 (1904).

Mandamus lies at request of person beneficially interested to compel the performance of an affirmative act by another where the duty to perform the act is clearly enjoined by law and where there is no other plain, speedy and adequate remedy in the ordinary course of law. El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm'rs, 89 N.M. 313, 551 P.2d 1360 (1976).

Writ may be used to question constitutionality. — Mandamus may not be used to control judicial discretion, but in the proper case, mandamus may be used to question

the constitutionality of a state statute. Montoya v. Blackhurst, 84 N.M. 91, 500 P.2d 176 (1972).

Mandamus affords proper remedy against ex official by de facto officer having prima facie right to obtain possession of the books, papers and other property of the office, and a pretended retention of the office by the late occupant will not justify him in withholding such property, with a view to compel resort to information in the nature of quo warranto by a party possessing the prima facie title. Conklin v. Cunningham, 7 N.M. 445, 38 P. 170 (1894).

One who has prima facie title to office may compel delivery to himself of the property and paraphernalia of the office by mandamus; the question of actual or ultimate title to the office must be reserved for another proceeding. Eldodt v. Territory ex rel. Vaughn, 10 N.M. 141, 61 P. 105 (1900).

B. JUDICIAL ACTS.

Mandamus is proper remedy to compel district court to take action or perform duties as required by legislative enactments. State ex rel. Maloney v. Neal, 80 N.M. 460, 457 P.2d 708 (1969).

Prohibatory mandamus. — Mandamus is a proper remedy by which to prohibit a public official from acting unlawfully or unconstitutionally. State ex rel. Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995); State ex rel. Taylor v. Johnson, 125 N.M. 343, 961 P.2d 768 (1998).

Simple ministerial task of setting case down for jury trial is an act which may be compelled by writ of mandamus. State ex rel. Cardenas v. Swope, 58 N.M. 296, 270 P.2d 708 (1954).

Remedy for erroneous refusal of appeal or supersedeas is mandamus and not by writ of error. Albright v. Territory ex rel. Sandoval, 13 N.M. 64, 79 P. 719 (1905), appeal dismissed, 200 U.S. 9, 26 S. Ct. 210, 50 L. Ed. 346 (1906); Gutierrez v. Territory ex rel. Curran, 13 N.M. 30, 79 P. 299 (1905), appeal dismissed, 202 U.S. 614, 26 S. Ct. 766, 50 L. Ed. 1171 (1906).

Writ lies to compel fixing amount of supersedeas bond. — Mandamus will be granted to command the trial court to fix the amount of the supersedeas bond, where an order and judgment granting a mandatory injunction have been appealed. State ex rel. Martinez v. Holloman, 25 N.M. 117, 177 P. 741 (1918).

C. ACTS BY PUBLIC OFFICIALS.

Mandamus is proper remedy to compel performance of official act by a public officer. City of Santa Rosa v. Jaramillo, 85 N.M. 747, 517 P.2d 69 (1973).

Governor's duty under primary election law to issue proclamation was mandatory and mandamus was properly granted to compel the governor to specify in his proclamation the boundaries of the district making up the office of county commissioner and terms of that office. State ex rel. Robinson v. King, 86 N.M. 231, 522 P.2d 83 (1974).

Writ lies to contest failure to certify nominees. — Mandamus is a proper action to contest the validity of the secretary of state's action in failing to certify a party's nominees. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968).

Mandamus compelling payment serves function of writ of execution. — Mandamus is one of the remedies and often the only one available to compel a governmental body to pay a money judgment. Mandamus issued to enforce payment of a money judgment against a governmental agency is only ancillary to and in aid of the judgment, and serves the same purpose as a writ of execution. State ex rel. State Hwy. Comm'n v. Quesenberry, 72 N.M. 291, 383 P.2d 255 (1963).

Writ lies where board has duty and mistakes its power. — Where appeal has been taken from the granting of an alternative writ of mandamus, and the answer shows that the respondent had failed to perform a clear legal duty, and was mistaken as to its power, and that it erroneously alleged that relator had other legal remedy, this court will not interfere, and a peremptory writ will issue. State ex rel. Thompson v. Beall, 37 N.M. 72, 18 P.2d 249 (1932).

Another's license not revoked for commercial advantages. — Commercial advantages, which the holder of a retail liquor license might gain by elimination of competition of another holder of a license, were too illusive and uncertain to entitle it to maintain mandamus proceedings, as a person enforcing special interest or private right, to compel revocation of the license of another. Ruidoso State Bank v. Brumlow, 81 N.M. 379, 467 P.2d 395 (1970), overruled on other grounds, De Vargas Sav. & Loan Ass'n v. Campbell, 87 N.M. 469, 535 P.2d 1320 (1975).

Mandamus lies to compel board of county commissioners to perform a duty required by statute. Codlin v. Kohlhousen, 9 N.M. 565, 58 P. 499 (1899), appeal dismissed, 181 U.S. 151, 21 S. Ct. 584, 45 L. Ed. 793 (1901).

To compel canvass of votes. — A board of canvassers may be compelled by mandamus to canvass votes, and to direct how they shall be returned and in whose favor an election certificate shall be issued. In re Sloan, 5 N.M. 590, 25 P. 930 (1891); Territory ex rel. Lewis v. Bd. of County Comm'rs, 5 N.M. 1, 16 P. 855 (1888).

To compel tax levy. — A writ of mandamus is properly directed to the mayor and city council to compel a tax levy. Territory ex rel. Parker v. Mayor of Socorro, 12 N.M. 177, 76 P. 283 (1904).

Writ remedy to teacher for refusal to rehire. — A teacher's remedy for refusal of the local school board to give her a hearing and a statement of reasons for its refusal to rehire her was to pursue mandamus. The jurisdiction of the state board is limited to review of decisions of the local school board made after an informal hearing, and the jurisdiction of the court of appeals is limited to review of decisions of the state board. Bertrand v. N. M. State Bd. of Educ., 88 N.M. 611, 544 P.2d 1176 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

To compel grievance proceeding under city merit system. — City may be compelled to hold a grievance proceeding under a city merit system, where there was evidence that the city officials had failed in their duty to provide a required remedy, and, the alternative, a suit in contract, would not have been plain, speedy, or adequate. Lovato v. City of Albuquerque, 106 N.M. 287, 742 P.2d 499 (1987).

Writ cannot make collateral attack on judgment. — Where judgments have been rendered against a county on certain of its bonds, attack may not be made on their validity by mandamus to compel payment. Territory ex rel. Coler v. Bd. of County Comm'rs, 14 N.M. 134, 89 P. 252 (1907), aff'd, 215 U.S. 296, 30 S. Ct. 111, 54 L. Ed. 202 (1909).

III. TYPE OF DUTY.

A. MINISTERIAL.

Writ does not lie unless specially enjoined upon warden. — Plaintiff could not prevail in petition for writ of mandamus where the act sought to be compelled was not one specially enjoined by law upon the warden. Apodaca v. Rodriguez, 84 N.M. 338, 503 P.2d 318 (1972).

Act to be compelled by mandamus must be ministerial, that is, an act or thing which the public official is required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case. El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm'rs, 89 N.M. 313, 551 P.2d 1360 (1976).

A ministerial act, as applied to a public officer, is an act or thing which he is required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case. Sender v. Montoya, 73 N.M. 287, 387 P.2d 860 (1963); State ex rel. Reynolds v. Bd. of Cnty. Comm'rs, 71 N.M. 194, 376 P.2d 976 (1962).

Writ lies to compel acts committed to official's discretion. — Acts and the duties under them are no less ministerial because the public official, upon whom the duty is enjoined, may have to satisfy himself as to the existence of facts necessary to require his action. Where he refuses to act after such a determination is made, mandamus is the proper remedy, and where he refuses or delays, mandamus will issue to compel

acts committed to his discretion if the law requires him to act one way or another. El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm'rs, 89 N.M. 313, 551 P.2d 1360 (1976).

To compel particular act upon shown facts. — While mandamus will not lie to correct or control the judgment or discretion of a public officer in matters committed to his care in the ordinary discharge of his duties, it will lie to compel the performance of mere ministerial acts or duties imposed by law upon a public officer to do a particular act or thing upon the existence of certain facts or conditions being shown, even though the officer be required to exercise judgment before acting. State ex rel. Reynolds v. Bd. of Cnty. Comm'rs, 71 N.M. 194, 376 P.2d 976 (1962).

Mandamus lies to compel judicial officer or court to perform an act or duty which is ministerial and does not include the exercise of discretion. Likewise, it will lie to require a court to perform its judicial duties, but not to do so in any particular way. State ex rel. Maloney v. Neal, 80 N.M. 460, 457 P.2d 708 (1969).

County commissioners' duties as to subdivisions formerly only ministerial. — Before the passage of the 1973 New Mexico Subdivision Act (Sections 47-5-9, 47-6-1 to 47-6-29 NMSA 1978), a board of county commissioners had nothing to do but the ministerial act of endorsing its approval on plats which complied with all statutory requirements for rural subdivisions, and mandamus was a proper remedy when it refused to do so. El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm'rs, 89 N.M. 313, 551 P.2d 1360 (1976).

B. DISCRETIONARY.

Mandamus will not direct performance of particular act from among two or more allowed alternatives. El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm'rs, 89 N.M. 313, 551 P.2d 1360 (1976).

Discretion in performing an act arises when it may be performed in one of two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it should be performed, but when a positive duty is enjoined and there is but one way in which it can be performed lawfully, then there is no discretion. State ex rel. Reynolds v. Bd. of Cnty. Comm'rs, 71 N.M. 194, 376 P.2d 976 (1962).

Where discretion is as to existence of facts entitling relator to the thing demanded, if facts are clearly proved or admitted, mandamus will lie to compel action according to law, for in such case the act to be done becomes purely ministerial and the duty to perform is absolute. City of Santa Rosa v. Jaramillo, 85 N.M. 747, 517 P.2d 69 (1973).

Writ lies to compel act even if exercising judgment required. — While mandamus will not lie to correct or control the judgment or discretion of a public officer in matters committed to his care in the ordinary discharge of his duties, it is nevertheless well established that mandamus will lie to compel the performance of mere ministerial acts

or duties imposed by law upon a public officer to do a particular act or thing upon the existence of certain facts or conditions being shown, even though the officer be required to exercise judgment before acting. Sender v. Montoya, 73 N.M. 287, 387 P.2d 860 (1963).

Mandamus is not available to control judicial discretion unless there is a clear abuse of that discretion, or unless such action would prevent the doing of useless things. State ex rel. Peters v. McIntosh, 80 N.M. 496, 458 P.2d 222 (1969).

Mandamus not available to limit prosecutorial discretion. — Although a prosecutor is required to present direct exculpatory evidence to the grand jury, he is invested with wide discretion as to the selection and presentation of evidence. Mandamus will not lie where the effect of its issuance would be to improperly limit the scope of the state's prosecutorial discretion. Kerpan v. Sandoval Cnty. Dist. Att'ys Office, 106 N.M. 764, 750 P.2d 464 (Ct. App. 1988).

Where officials have discretion, no clear legal duty exists. — Mandamus is a remedy for the violation of a clear legal duty, and where no such legal duty is required, as where village officials may exercise discretion, it follows that it would be improvident to issue the writ. State ex rel. Sun Co. v. Vigil, 74 N.M. 766, 398 P.2d 987 (1965).

No basis for writ if official has discretion. — Under former Section 42-1-23 NMSA 1978, if the state highway commission (now state transportation commission) has a clear legal duty to sell to the property owner, the writ of mandamus may compel the discharge of the duty, but if there is discretion to sell, rather than a clear legal duty to do so, there is no basis for the writ. State ex rel. State Hwy. Comm'n v. Clark, 79 N.M. 29, 439 P.2d 547 (1968).

Law reviews. — For comment, "Civil Procedure - Dismissal and Nonsuit - Mandamus," see 4 Nat. Resources J. 413 (1964).

For article, "Mandamus in New Mexico," see 4 N.M.L. Rev. 155 (1974).

For note, "Mandamus Proceedings Against Public Officials: State of New Mexico ex rel. Bird v. Apodaca," see 9 N.M.L. Rev. 195 (1978-79).

For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Mandamus §§ 4, 63 to 93.

Mandamus to compel construction or repair of school buildings, 1 A.L.R. 1559.

Election of remedies as between mandamus and an action for damages, 1 A.L.R. 1698.

Mandamus to compel court to assume or exercise jurisdiction where it has erroneously dismissed the cause or refused to proceed on the ground of supposed lack of jurisdiction, 4 A.L.R. 582, 82 A.L.R. 1163.

Mandamus to compel a court to take jurisdiction of cause that it has erroneously dismissed for supposed insufficiency or lack of service of process, 4 A.L.R. 610.

Inadequacy of remedy by appeal or writ of error as affecting right to mandamus to inferior court, 4 A.L.R. 632.

Mandamus to compel a court to reinstate or proceed with the hearing of an appeal that it has erroneously dismissed, 4 A.L.R. 655.

Salary of public officer or employee, mandamus to compel payment of, 5 A.L.R. 572.

Mandamus as proper remedy to compel payment of soldier's bounty, 13 A.L.R. 604, 35 A.L.R. 791, 22 A.L.R.2d 1134.

Mandamus to compel performance of duties after resignation of officer, 19 A.L.R. 48.

Officer's liability to penalty, fine or imprisonment as affecting right to mandamus to enforce performance of public duty by him, 19 A.L.R. 1382.

Partner's right to maintain mandamus against copartners, 21 A.L.R. 129.

Mandamus to enforce stockholders' right to inspect books and records, 22 A.L.R. 43, 43 A.L.R. 786, 59 A.L.R. 1373, 80 A.L.R. 1517, 174 A.L.R. 291, 15 A.L.R.2d 11.

Unfitness as affecting right to restoration by mandamus to office from which one has been illegally removed, 36 A.L.R. 508.

Action or suit as abating mandamus proceeding or vice versa, 37 A.L.R. 1432.

Mandamus to compel enrollment or restoration of pupil in state school or university, 39 A.L.R. 1019.

Mandamus to compel court or judge to require witness to testify, 41 A.L.R. 436.

Mandamus against municipality to compel improvement or repair of street or highway, 46 A.L.R. 257.

Mandamus to compel legislature to make apportionment of representatives or election districts, 46 A.L.R. 964.

Mandamus as remedy for interference with right-of-way, 47 A.L.R. 557.

Mandamus to compel institution of proceedings to oust public officer, 51 A.L.R. 561.

Mandamus as a remedy for exclusion of eligible class or classes of persons from jury list, 52 A.L.R. 928.

Remedy by mandamus of creditor against officer who fails to levy under execution, 57 A.L.R. 836.

Mandamus to compel collection of taxes, 58 A.L.R. 117.

Mandamus as remedy delay in bringing accused to trial or to retrial after reversal, 58 A.L.R. 1510.

Enforceability of right to inspect public records by mandamus, 60 A.L.R. 1356, 169 A.L.R. 653.

Failure properly to index conveyance or mortgage of realty as affecting constructive notice, 63 A.L.R. 1057.

Mandamus to compel general course of conduct or performance of continuing duty or series of acts, 64 A.L.R. 975.

Mandamus to prevent records clerk from continuing to permit use of his office by abstract company, 80 A.L.R. 784.

Mandamus to compel consideration, acceptance or rejection of bids for public contract, 80 A.L.R. 1382.

Mandamus to compel appropriation for payment of salary of public officer or employee, 81 A.L.R. 1253.

Mandamus to compel consideration, allowance or payment of claim under workmen's compensation acts, 82 A.L.R. 1073.

Mandamus to compel court to assume jurisdiction where it has erroneously refused to proceed on ground of lack of jurisdiction, 82 A.L.R. 1163.

Mandamus as proper remedy to compel service by public utility, 83 A.L.R. 947.

Mandamus to compel service by telephone or telegraph company, 83 A.L.R. 950.

Mandamus to put one in possession of office, title to which is in dispute, 84 A.L.R. 1114, 136 A.L.R. 1340.

Right of several having interests to join as relators in mandamus proceedings, 87 A.L.R. 528.

Right to mandamus to compel full payment of claim when fund out of which obligation is payable is insufficient to pay all obligations of equal dignity, 90 A.L.R. 717, 171 A.L.R. 1033.

Mandamus to compel official to approve bond proffered in legal proceedings, 92 A.L.R. 1211.

Mandamus as a proper remedy for return of a tax illegally or erroneously exacted, 93 A.L.R. 585.

Mandamus to compel delivery of papers and records to corporation, 93 A.L.R. 1061.

Mandamus to enforce payment of special assessment against public property, 95 A.L.R. 700, 150 A.L.R. 1394.

Mandamus to restore license as proper remedy where professional license has been wrongfully revoked, 95 A.L.R. 1424.

Mandamus as remedy for purging of registration list, 96 A.L.R. 1050.

Mandamus to compel payment of state, county, municipal or quasi-municipal corporation warrant, 98 A.L.R. 442.

Mandamus by creditor of corporation to reach fund or securities deposited with state official as security for corporate obligations, 101 A.L.R. 500.

Change of incumbent of office or of personnel of board or other official body as affecting mandamus proceeding previously commenced, 102 A.L.R. 943.

Mandamus to compel performance of public or ministerial duty, 105 A.L.R. 1124.

Determination of canvassing board or election official as regards counting or exclusion of ballots as subject of review by mandamus, 107 A.L.R. 618.

Right of holder of license from public to question propriety of issuing license to other persons, 109 A.L.R. 1259.

Court's control over mandamus as means of avoiding enforcement of strict legal right, to detriment of the public, 113 A.L.R. 209.

Mandamus as taxpayer's remedy in respect of valuation of property for taxation, 131 A.L.R. 360.

Mandamus to compel action regarding free transportation of school pupils, 118 A.L.R. 818, 146 A.L.R. 625.

Mandamus to members or officer of legislature, 136 A.L.R. 667.

Mandamus against unincorporated association or its officers, 137 A.L.R. 311.

Mandamus to compel reinstatement of suspended or expelled members of labor union, 141 A.L.R. 617.

Right to go behind money judgment against public body in mandamus proceeding to enforce it, 155 A.L.R. 464.

Mandamus as subject to statute of limitations, 155 A.L.R. 1144.

Remedies for exclusion of eligible class of persons from jury list in civil case, 166 A.L.R. 1422.

Private rights and remedies to enforce right based on civil rights statute, 171 A.L.R. 920.

Legislature's express denial of right of appeal as affecting right to review on the merits by certiorari or mandamus, 174 A.L.R. 194.

Default as condition of right to compel governmental body to pay, or make provision for payment of, its obligations, 175 A.L.R. 648.

Corporation as necessary or proper party defendant in proceedings to determine validity of election or appointment of corporate director or officer, 21 A.L.R.2d 1048.

Remedy for refusal of corporation or its agent to register or effectuate transfer of stock, 22 A.L.R.2d 12.

Mandamus to compel judge or other officer to grant accused bail or to accept proffered sureties, 23 A.L.R.2d 803.

Compelling municipal officials to enforce zoning regulations, 35 A.L.R.2d 1135.

Remedy by appeal or writ of error as affecting mandamus to enforce right to jury trial, 41 A.L.R.2d 780.

Mandamus as remedy to compel assertedly disqualified judge to recuse self or to certify his disqualification, 45 A.L.R.2d 937, 56 A.L.R. Fed. 494.

Venue of actions or proceedings against public officers, 48 A.L.R.2d 423.

Compelling holding of stockholders' meetings, 48 A.L.R.2d 615.

Private person's right to institute mandamus to compel a magistrate or other appropriate official to issue a warrant, or the like, for an arrest, 49 A.L.R.2d 1285.

Availability of mandamus to review order of reference to master or auditor, 76 A.L.R.2d 1120.

Remedy to review verdict at coroner's inquest, 78 A.L.R.2d 1218.

Compelling admission to membership in professional association or society, 89 A.L.R.2d 964.

Compelling ascertainment of compensation for property taken or for injuries inflicted under power of eminent domain, 91 A.L.R.2d 991.

Remedy to review ruling on change of venue in civil case, 93 A.L.R.2d 802.

Mandamus to compel discovery proceedings, 95 A.L.R.2d 1229.

Mandamus to compel disciplinary investigation or action against physician or attorney, 33 A.L.R.3d 1429.

Mandamus to protect charitable or eleemosynary corporation against use or same or similar name by another corporation, 37 A.L.R.3d 277.

Mandamus, under 28 USCS § 1361, to obtain change in prison condition or release of federal prisoner, 114 A.L.R. Fed. 225.

55 C.J.S. Mandamus §§ 51 to 239.

Attorney general opinions.

Mandamus lies to compel official's performance. — It is the general rule that mandamus will lie to compel the performance by a public body or official of a clear, plain duty. 1961-62 Op. Att'y Gen. No. 61-37.

44-2-5. [Adequate remedy at law; writ will not issue; who may obtain writ.]

The writ shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law. It shall issue on the information of the party beneficially interested.

History: Laws 1884, ch. 1, § 39; C.L. 1884, § 1994; C.L. 1897, § 2762; Code 1915, § 3414; C.S. 1929, § 86-104; 1941 Comp., § 26-105; 1953 Comp., § 22-12-5.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Mandamus can only be resorted to when other remedies fail. State ex rel. Sweeney v. Second Judicial Dist., 17 N.M. 282, 127 P. 23 (1912).

Municipality without right to appeal may enforce rights by mandamus. — When a municipality is not given a right to appeal and thus has no plain, speedy or adequate remedy at law to enforce its rights to protect the health, safety, welfare and morals of its residents, these rights may be enforced by mandamus. City of Santa Rosa v. Jaramillo, 85 N.M. 747, 517 P.2d 69 (1973).

Where remedy at law exists writ will not lie. — As respondents had a plain, speedy and adequate remedy at law from the order denying their motion to quash the writs of garnishment, to wit, an appeal by trial de novo therefrom to the district court, mandamus did not lie to correct the claimed error by respondent, if in fact error was committed. Alfred v. Anderson, 86 N.M. 227, 522 P.2d 79 (1974).

Writ lies if no remedy in ordinary course of law. — Refusal of state corporation commission (now public regulation commission) to draw a voucher for the salary of an employee of the commission entitles him to resort to the remedy of mandamus, as the ordinary course of law does not afford a plain, speedy and adequate remedy. State ex rel. Stephens v. SCC, 25 N.M. 32, 176 P. 866 (1918).

Writ may be maintained if plain ministerial duty required. — Where a teacher, by positive provision of law, has a fixed tenure of office, or can be removed only in a certain prescribed manner, and where consequently it is the plain ministerial duty to retain him, mandamus can be maintained. Mandamus is not an available remedy for enforcement of contract rights because there is another adequate remedy in the ordinary course of the law, in the form of an action for damages. State ex rel. Sittler v. Bd. of Educ., 18 N.M. 183, 135 P. 96 (1913).

Writ can compel canvass of election returns. — Under this section, an information was properly filed as the basis of proceeding for writ of mandamus to compel board of county commissioners to canvass election returns. Territory ex rel. Lewis v. Bd. of Cnty. Comm'rs, 5 N.M. (Gild., E.W.S. ed.) 1, 16 P. 855 (1888).

Alternative writ and answer only pleadings considered. — The only pleadings to be considered on a petition for the writ are the alternative writ and the answer thereto. Schreiber v. Baca, 58 N.M. 766, 276 P.2d 902 (1954).

The petition for the writ becomes functus officio when granted. Schreiber v. Baca, 58 N.M. 766, 276 P.2d 902 (1954).

II. PLAIN AND ADEQUATE.

Writ cannot lie where adequate law or appeal remedy exists. — Mandamus will not lie where there exists a plain, speedy and adequate remedy at law; nor will it lie where

there is an adequate remedy by appeal. Montoya v. Blackhurst, 84 N.M. 91, 500 P.2d 176 (1972).

Writ will not lie to enforce contract where adequate remedy exists. — Mandamus will not issue to enforce a contract, even though a legally enforceable contract exists, if there is an adequate remedy at law. Shepard v. Bd. of Educ., 81 N.M. 585, 470 P.2d 306 (1970).

Writ cannot lie until administrative remedies exhausted. — Mandamus is a proper remedy only after a petitioner has exhausted his administrative remedies. Shepard v. Bd. of Educ., 81 N.M. 585, 470 P.2d 306 (1970).

Inadequacy not absence determines propriety of writ. — It is the inadequacy, and not the mere absence, of all other legal remedies, and the danger of a failure of justice without it, that must usually determine the propriety of a writ of mandamus; and it is not excluded by other remedies, which are not adequate to secure the specific relief needed, nor by the existence of a specific remedy in equity. Conklin v. Cunningham, 7 N.M. 445, 38 P. 170 (1894).

Writ where alternative remedy insufficient. — City may be compelled to hold a grievance proceeding under a city merit system, where there was evidence that the city officials had failed in their duty to provide a required remedy, and, the alternative, a suit in contract, would not have been plain, speedy, or adequate. Lovato v. City of Albuquerque, 106 N.M. 287, 742 P.2d 499 (1987).

Declaratory judgment not intended as substitute for mandamus. — Declaratory judgment actions are not intended to provide a substitute for other available actions, such as mandamus. A mandamus will not be denied on the ground that the plaintiff did not bring a declaratory judgment action. City of Albuquerque v. Ryon, 106 N.M. 600, 747 P.2d 246 (1987).

Mandamus will not lie where adequate remedy by appeal, or writ of error exists. State ex rel. Sweeney v. Second Judicial Dist., 17 N.M. 282, 127 P. 23 (1912).

Appeal must also be taken from administrative decisions. — Mandamus will not lie when the relator has failed to pursue a statutory right to appeal to district court from an administrative decision. Birdo v. Rodriguez, 84 N.M. 207, 501 P.2d 195 (1972).

Erroneous sentence must also be appealed. — Where defendant received erroneous sentence upon conviction of forgery, but failed to exercise right of appeal, mandamus would not lie to compel parole board to treat his sentence as if correct. State Bd. of Parole v. Lane, 63 N.M. 105, 314 P.2d 602 (1957).

Cannot compel signing bill of exception after appeal's return date. — Mandamus will not lie to compel a district judge to sign and settle a bill of exceptions not tendered

until after the return day of appeal. State ex rel. Divelbiss v. Raynolds, 17 N.M. 662, 132 P. 249 (1913).

Liquor license applicant's remedy after division's final decision was appeal. — Where a letter from division of liquor control clearly shows that the application had been considered and in fact that the application cannot be processed because the quota of one license to each 2000 people has been more than filled in Rio Arriba county, there can be no doubt this amounted to a final decision on division's part to refuse the application. A decision is a determination arrived at after consideration, an opinion formed, or a course of action decided upon. The applicant's remedy upon being advised of the decision was by appeal to the district court of Santa Fe County as expressly provided by former Section 46-5-16 , 1953 Comp. It follows that the district court erred in entering its judgment ordering the issuance of a peremptory writ of mandamus. Armijo v. Armijo, 77 N.M. 742, 427 P.2d 258 (1967).

Teacher's failure to follow statutory remedy negatived his right to proceed by mandamus. Sanchez v. Bd. of Educ., 68 N.M. 440, 362 P.2d 979 (1961).

Adequate law remedy exists to redress public lands commissioner's acts. — Section 19-7-67 NMSA 1978 provides an adequate remedy at law for anyone who is aggrieved by the action of the commissioner of public lands and therefore, mandamus does not lie to compel the duties alleged to be due. Andrews v. Walker, 60 N.M. 69, 287 P.2d 423 (1955).

Writ lies to enforce provisions of judgment in condemnation proceeding. — Rule that mandamus will not issue to enforce contract rights "because there is another adequate remedy in the ordinary course of law, in the form of an action for damages" was not applicable when property owner sought mandamus to enforce provisions of a judgment in a condemnation proceeding because money damages were not an adequate remedy in actions for specific performance of land sales contract; and "there can be no monetary substitute for the precise land bargained for." State ex rel. State Hwy. Comm'n v. Clark, 79 N.M. 29, 439 P.2d 547 (1968).

Administrative duties must be exhausted. — Mandamus does not lie when the relator has failed to exhaust an adequate administrative remedy provided by statute. Birdo v. Rodriguez, 84 N.M. 207, 501 P.2d 195 (1972).

Writ cannot lie where administrative remedies unexhausted and pleadings deficient. — Where the pleading was patently deficient and where there was a failure to exhaust administrative remedies, the trial court did not err in dismissing plaintiff's mandamus claim sua sponte and without appointment of counsel. Orrs v. Rodriguez, 84 N.M. 355, 503 P.2d 335 (Ct. App. 1972).

III. SPEEDY.

Writ lies where early constitutionality decision of importance. — Mandamus was a proper remedy by which the petitioner could attack the constitutionality of statute in view of the possible inadequacy of other remedies and the necessity of an early decision on question of great public importance. Thompson v. Legislative Audit Comm'n, 79 N.M. 693, 448 P.2d 799 (1968).

Mandamus will lie to determine proper place of trial, before trial, where great delay and expense would result from pursuing an appeal and where a change in venue was made without authority. State ex rel. Cardenas v. Swope, 58 N.M. 296, 270 P.2d 708 (1954).

Mandamus lies where combination of facets of litigation cause delay. — The ordinary delays attendant to a somewhat involved trial would not of itself justify mandamus nor would the fact that the petitioner does not have the benefit of a replevin bond although this is a circumstance which must be considered in connection with the delays of a trial and subsequent appeal. It is more the combination of all the various facets of the litigation which makes it apparent that to refuse the writ "would result in needless expense and delay" and therefore the ordinary remedy by appeal is inadequate here. Sender v. Montoya, 73 N.M. 287, 387 P.2d 860 (1963).

IV. BENEFICIALLY INTERESTED.

Mandamus lies at request of person beneficially interested to compel the performance of an affirmative act by another where the duty to perform the act is clearly enjoined by law and where there is no other plain, speedy and adequate remedy in the ordinary course of law. El Dorado at Santa Fe, Inc. v. Bd. of County Comm'rs, 89 N.M. 313, 551 P.2d 1360 (1976).

Standing of private parties to obtain writ to vindicate public interest. — Even though a private party may not have standing to invoke the power of the supreme court to resolve constitutional questions and enforce constitutional compliance, the supreme court, in its discretion, may grant standing to private parties to obtain a writ of mandamus to vindicate the public interest in cases presenting issues of great public importance. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974); State ex rel. Johnson, 120 N.M. 562, 904 P.2d 11 (1995).

Where a city mayor initiated a mandamus action in the mayor’s official and individual capacity to prohibit the enforcement of an allegedly unconstitutional statute that permitted local governments to regulate some aspects of the right to bear arms and during the pendency of the proceeding, the former mayor was succeeded by a new mayor who sought to dismiss the action, the Supreme Court conferred standing on the former mayor to maintain the mandamus action in the former mayor’s individual capacity due to the importance of the issues involved. Baca v. N.M. Dep’t of Public Safety, 2002-NMSC-017, 132 N.M. 282, 47 P.3d 441.

City is "beneficially interested" in suit to compel its treasurer to deposit the money in his hands belonging to it in a bank designated by ordinance, from which it would receive interest. Territory ex rel. City of Albuquerque v. Matson, 16 N.M. 135, 113 P. 816 (1911).

Plaintiff not "beneficially interested". — Where plaintiffs, in an action attacking the legality of legislation authorizing Indian gaming in New Mexico (11-13-1 and 11-13-2 NMSA 1978), asserted only an abstract right owed to the people of the state as a whole, they were not "beneficially interested" parties under this section. State ex rel. Coll v. Johnson, 1999-NMSC-036, 128 N.M. 154, 990 P.2d 1277.

Citizen may apply to enforce performance of public duty. — As a general rule, mandamus may issue to enforce the performance of a public duty by public officers not due to the government itself as such, upon application of any citizen whose rights are affected in common with those of the general public. State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P. 242 (1926).

Taxpayer has no standing to enforce duty owed to public. — The University of New Mexico is a creature of the N.M. Const., art. XII, §§ 12, 13, augmented by Sections 21-7-1 to 21-7-3 NMSA 1978, and the respondents owe their duties to the state of New Mexico, not to a private person. This being so, it follows that relator, though a taxpayer, has no standing to enforce by mandamus a duty owing to the public. Womack v. Regents of Univ. of N.M., 82 N.M. 460, 483 P.2d 934 (1971).

State and not parents of victim interested in murder prosecution. — Discretion of appointed or elected public officials charged with criminal prosecution cannot be controlled by mandamus proceedings in murder prosecution since it is the state rather than parents of child who was killed which is the party beneficially interested in the prosecution. State ex rel. Naramore v. Hensley, 53 N.M. 308, 207 P.2d 529 (1949).

Law reviews. — For comment on Sender v. Montoya, 73 N.M. 287, 387 P.2d 860 (1963), see 4 Nat. Resources J. 413 (1964).

For article, "Prisoners Are People," see 10 Nat. Resources J. 869 (1970).

For article, "Mandamus in New Mexico," see 4 N.M.L. Rev. 155 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Mandamus §§ 46 to 58.

Adequacy of remedy by indictment so as to bar mandamus to compel improvement or repair of highway or bridge, 46 A.L.R. 267.

Existence of other remedy as affecting right to mandamus to compel return of tax illegally or erroneously exacted, 93 A.L.R. 589.

Mandamus to compel payment of state, county, municipal or quasi-municipal corporation warrants as affected by remedy at law, 98 A.L.R. 449.

55 C.J.S. Mandamus § 17.

44-2-6. [Contents of writ.]

The writ is either alternative or peremptory. The alternative writ shall state concisely the facts showing the obligation of the defendant to perform the act, and his omission to perform it, and command him, that immediately after the receipt of the writ, or at some other specified time, he do the act required to be performed, or show cause before the court out of which the writ issued, at a specified time and place, why he has not done so; and that he then and there return the writ with his certificate of having done as he is commanded. The peremptory writ shall be in a similar form, except that the words requiring the defendant to show cause why he has not done as commanded, shall be omitted.

History: Laws 1884, ch. 1, § 40; C.L. 1884, § 1995; C.L. 1897, § 2763; Code 1915, § 3415; C.S. 1929, § 86-105; 1941 Comp., § 26-106; 1953 Comp., § 22-12-6.

ANNOTATIONS

Cross references. — As to writ and answer being only pleading allowed in mandamus proceeding, see 44-2-11 NMSA 1978.

Contents of the permanent writ. — No rule requires a permanent writ that follows an alternative writ to contain the recitation of facts required in Section 44-2-6 NMSA 1978. Where a party has made a full scale response to the issuance of a writ it cannot successfully attack the permanent writ for legal insufficiency. Os Farms, Inc. v. N.M. Am. Water Co., Inc., 2009-NMCA-113, 147 N.M. 221, 218 P.3d 1269.

Contents of the peremptory writ. — The peremptory writ failed to state a claim for relief when it contained only bare legal conclusions and alleged no facts supporting a ministerial duty. Brantley Farms v. Carlsbad Irrigation Dist., 1998-NMCA-023, 124 N.M. 698, 954 P.2d 763.

Facts pleaded in same manner as in ordinary actions. — Allegations of fact in mandamus proceedings should be pleaded with the same certainty, no more and no less, as in ordinary actions. State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P. 242 (1926).

Allegations of fact in application form no part of writ. — Allegations of fact in an application for alternative writ of mandamus form no part of the writ and ordinarily cannot be so considered in determining the legal sufficiency of the writ. Mora County Bd. of Educ. v. Valdez, 61 N.M. 361, 300 P.2d 943 (1956).

To entitle relator to writ of mandamus he must first show himself to be entitled legally to some right properly the subject of the writ, and that it is legally demandable from the person to whom the writ is directed; second, that the person to whom the writ is directed still has it in his power to perform the duty required; third, that whatever is required to be done by the said relator as a condition precedent to the right demanded must be shown affirmatively to have been done by him. Territory ex rel. Gildersleeve v. Perea, 6 N.M. 531, 30 P. 928 (1892), appeal dismissed, 163 U.S. 697, 16 S. Ct. 1207, 41 L. Ed. 307 (1896), overruled on other grounds by Cavender v. Phillips, 41 N.M. 235, 67 P.2d 250 (1937) (decided under former tax law).

Requirement that writ contain allegations of all facts necessary to authorize the relief sought applies with great reason to peremptory writs of mandamus issued in ex parte proceedings. Mora County Bd. of Educ. v. Valdez, 61 N.M. 361, 300 P.2d 943 (1956).

Requirements not met when no showing of obligation to act. — Compliance with the requirements of the statute which governs content of writs of mandamus was not had where there was no statement of facts showing respondent's obligation to perform any particular act, and the essential elements were not inferable from what is said in the petition. Birdo v. Rodriguez, 84 N.M. 207, 501 P.2d 195 (1972).

Writ must allege facts necessary to authorize relief sought. — Once the proceeding is accepted as one in mandamus, then certain well-recognized rules emerge to control the consideration of the case. A most important one is that the case must be tried on the writ and answer. The complaint itself drops out of the picture and the writ must contain allegations of all facts necessary to authorize the relief sought. Furthermore, allegations in the writ should be made as in ordinary actions. Hence, the usual rules applicable in testing the sufficiency of a complaint in an ordinary civil action apply. The facts should be pleaded with the same certainty, neither more nor less. Alfred v. Anderson, 86 N.M. 227, 522 P.2d 79 (1974).

Appeal dismissed where required procedures in mandamus proceedings not followed. — Where procedures, required in mandamus proceedings, were not followed as no writ ever issued, and the order to show cause did not even closely approximate the requirements of a writ; none of the ordinary elements expected and required to be in a writ were found in the order; no issues were raised or presented at trial in the required manner, and, consequently, could not have been tested as to sufficiency according to ordinary rules of pleading, then an appellate court must dismiss the appeal. Alfred v. Anderson, 86 N.M. 227, 522 P.2d 79 (1974).

Erroneous dismissal contested without formal exception. — A judgment dismissing an action and quashing an alternative writ of mandamus, because of failure of the writ to comply with the requirements of this section, if erroneously entered and appearing in the record proper, is inherently and fatally defective, and may be contested in the supreme court without formal exception. State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P. 242 (1926).

Writ not void because title to office incidentally involved. — In mandamus proceeding involving contempt for failure of an official to recognize one of rival claimants for county office, where the court had jurisdiction of the subject matter and the parties, the writ was not void because it involved incidentally the title to the office. Delgado v. Chavez, 5 N.M. 646, 25 P. 948, aff'd sub nom In re Delgado, 140 U.S. 586, 11 S. Ct. 874, 35 L. Ed. 578 (1891).

Where factual allegations were not contested, either in the trial court or on appeal, it is concluded that the party admitted the factual allegations and waived its right to any defects in the writ. City of Sunland Park v. N.M. Pub. Regulation Comm'n., 2004-NMCA-024, 135 N.M. 143, 85 P.3d 267, cert. denied, 2004-NMCERT-002, 135 N.M. 169, 86 P.3d 47.

Law reviews. — For article, "Mandamus in New Mexico," see 4 N.M. L. Rev. 155 (1974).

For note, "Mandamus Proceedings Against Public Officials: State of New Mexico ex rel. Bird v. Apodaca," see 9 N.M.L. Rev. 195 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Mandamus §§ 427, 428, 477.

55 C.J.S. Mandamus §§ 317, 349.

44-2-7. [When peremptory or alternative writs issued.]

When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance; in all other cases the alternative writ shall be first issued.

History: Laws 1884, ch. 1, § 41; C.L. 1884, § 1996; C.L. 1897, § 2764; Code 1915, § 3416; C.S. 1929, § 86-106; 1941 Comp., § 26-107; 1953 Comp., § 22-12-7.

ANNOTATIONS

This section does not violate due process of law. Bd. of Comm'rs v. Dist. Court, 29 N.M. 244, 223 P. 516 (1924).

Peremptory writ of mandamus may issue without a hearing. Territory ex rel. Coler v. Bd. of County Comm'rs, 14 N.M. 134, 89 P. 252 (1907), aff'd, 215 U.S. 296, 30 S. Ct. 111, 54 L. Ed. 202 (1909).

Demand is not necessary before bringing suit by mandamus to compel county commissioners to levy tax to satisfy judgments on county bonds, where it is clear the board does not intend to perform its duty. Territory ex rel. Coler v. Bd. of County

Comm'rs, 14 N.M. 134, 89 P. 252 (1907), aff'd, 215 U.S. 296, 30 S. Ct. 111, 54 L. Ed. 202 (1909).

Peremptory writ issues in first instance only where right clear. — A peremptory writ of mandamus may issue in the first instance only where the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it. Mora County Bd. of Educ. v. Valdez, 61 N.M. 361, 300 P.2d 943 (1956).

Peremptory writ must contain all necessary facts that authorize relief. — Requirement that the writ contain allegations of all facts necessary to authorize the relief sought applies with great reason to peremptory writs of mandamus issued in ex parte proceedings. Mora County Bd. of Educ. v. Valdez, 61 N.M. 361, 300 P.2d 943 (1956).

Writ must show that no valid excuse can be given. — Under this section, a peremptory writ of mandamus issued in an ex parte proceeding must contain allegations of all facts necessary to show that the right to require performance of the act sought is clear and that no valid excuse can be given for not performing it. Rivera v. Nunn, 78 N.M. 208, 430 P.2d 102 (1967).

Once final judgment reached official's refusal to act unjustified. — Where the final judgment condemned the property and awarded damages to the condemnees, any refusal to act by the officers named would not be justified, because they would have no discretion but to comply with the judgment. State ex rel. State Hwy. Comm'n v. Quesenberry, 74 N.M. 30, 390 P.2d 273 (1964).

Peremptory writ may be issued to compel board of canvassers to count the votes and to issue a writ of election. Territory ex rel. Lewis v. Bd. of Cnty. Comm'rs, 5 N.M. (Gild., E.W.S. ed.) 1, 16 P. 855 (1888).

Writ may compel election certificate be issued to relator. — Where it appears that a board of canvassers have failed to count votes which should have been counted, and where, if such votes were counted, the relator would be elected, the court may, by peremptory writ of mandamus, direct the board of canvassers to count such votes, and to issue to relator a certificate of election. Territory ex rel. Lewis v. Bd. of Cnty. Comm'rs, 5 N.M. (Gild., E.W.S. ed.) 1, 16 P. 855 (1888).

Issuance of peremptory writ of mandamus is not a final order for purposes of appeal when an issue of damages in connection with the activity covered by the writ has not been resolved. Vill. of Los Ranchos v. Sanchez, 2004-NMCA-128, 136 N.M. 528, 101 P.3d 339, cert. denied, 2004-NMCERT-011, 136 N.M. 656, 103 P.3d 580.

Writ of prohibition issuing from state supreme court is final judgment within the meaning of 28 U.S.C. § 1257, and review of all proceedings concerning such should be sought in the United States supreme court. Gibner v. Oman, 459 F. Supp. 436 (D.N.M. 1977).

Suggested action not sufficient predicate for compulsion by writ. — In a judicial decree a finding of fact not followed by a mandatory statement is of no effect. Thus the act sought to be enforced must be based upon the clear direction of the state to a local authority, and a bare finding of fact followed only by a recommendation of suggested action does not afford sufficient predicate for the compulsion of the act. Mora Cnty. Bd. of Educ. v. Valdez, 61 N.M. 361, 300 P.2d 943 (1956).

Act recommended by superior authority not compelled by peremptory writ. — The performance of an act which is merely recommended by a superior authority is not of such character that it may be compelled by the issuance of peremptory writ of mandamus. Mora County Bd. of Educ. v. Valdez, 61 N.M. 361, 300 P.2d 943 (1956).

Fact issues which go to basis of writ are defense. — In a mandamus proceeding brought by employees of a city to collect compensation due them, issues of fact as to whether petitioners were in fact city employees, whether they had performed services, and the amount of pay, if any, to which they were entitled, are all questions which could form the basis of a legal defense to the issuance of a writ of mandamus. Rivera v. Nunn, 78 N.M. 208, 430 P.2d 102 (1967).

District court, proceeding under this section, has jurisdiction to decide whether the case is one in which a peremptory writ is authorized or not. Bd. of Comm'rs v. Dist. Court, 29 N.M. 244, 223 P. 516 (1924).

Order making writ final neither final judgment nor interlocutory decision. — Mandamus, as issued in a condemnation case to enforce a money judgment against the highway commission, was neither a prerogative writ nor a new suit, and the order making the writ permanent was neither a final judgment nor an interlocutory judgment, order or decision within the meaning of rules governing appeals. State ex rel. State Hwy. Comm'n v. Quesenberry, 72 N.M. 291, 383 P.2d 255 (1963).

Law reviews. — For article, "Prisoners Are People," see 10 Nat. Resources J. 869 (1970).

For article, "Mandamus in New Mexico," see 4 N.M. L. Rev. 155 (1974).

For note, "Mandamus Proceedings Against Public Officials: State of New Mexico ex rel. Bird v. Apodaca," see 9 N.M.L. Rev. 195 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Mandamus § 476.

Right to, and necessity of, amendment of alternative writ of mandamus to conform to peremptory writ, 100 A.L.R. 404.

Provisional or alternative writ or order to show cause as condition of granting peremptory or absolute writ, 116 A.L.R. 659.

55 C.J.S. Mandamus § 344.

44-2-8. [Allowance of writ; return day; service.]

The court or judge, by an indorsement on the writ, shall allow the same, designate the return day thereof and direct the manner of service.

History: Laws 1884, ch. 1, § 42; C.L. 1884, § 1997; C.L. 1897, § 2765; Code 1915, § 3417; C.S. 1929, § 86-107; 1941 Comp., § 26-108; 1953 Comp., § 22-12-8.

ANNOTATIONS

Law reviews. — For article, "Mandamus in New Mexico," see 4 N.M. L. Rev. 155 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Mandamus §§ 411, 428, 480.

55 C.J.S. Mandamus §§ 319, 321, 350, 351.

44-2-9. [Answer to writ.]

On the return day of the alternative writ, or such further day as the court allows, the party on whom the writ is served may show cause by answer, made in the same manner as an answer to a complaint in civil action.

History: Laws 1884, ch. 1, § 43; C.L. 1884, § 1998; C.L. 1897, § 2766; Code 1915, § 3418; C.S. 1929, § 86-108; 1941 Comp., § 26-109; 1953 Comp., § 22-12-9.

ANNOTATIONS

Cross references. — As to answers generally, see Rules 1-008 and 1-012 NMRA.

Where answer requests court to invoke judgment respondent submits to court. — In a mandamus proceeding to compel board of county commissioners to canvass election returns of a certain precinct where respondents requested the court to inspect the evidence offered with their answer, and bring into court all the returns, certificates, poll books and ballot box, and invoke its judgment as to the legal sufficiency to justify the action of the board, such action on their part is a submission to the court, and they cannot insist on a jury trial nor will they be heard to object that there is no evidence, upon the issue of facts raised by their answer, to support the judgment of the court below in awarding a peremptory writ. Territory ex rel. Lewis v. Bd. of County Comm'rs, 5 N.M. (Gild., E.W.S. ed.) 1, 16 P. 855 (1888).

Time to answer may be extended and amendments allowed. — While office of mandamus is to afford a speedy remedy and to avoid delay, this does not mean that the

court is without power to extend the time within which a respondent may answer, or that the answer may not be amended, and leave to amend should be freely given when justice demands. State ex rel. Fitzhugh v. City Council of Hot Springs, 56 N.M. 118, 241 P.2d 100 (1952).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Mandamus §§ 432 to 437.

Absence of appropriation or funds as defense to mandamus to compel payment of salary of public officer or employee, 5 A.L.R. 579.

Unconstitutionality of statute as defense to mandamus proceeding, 30 A.L.R. 378, 129 A.L.R. 941.

55 C.J.S. Mandamus §§ 272 to 274.

44-2-10. [Peremptory mandamus on failure to answer; procedure after answer.]

If no answer is made a peremptory mandamus shall be allowed against the defendant; if an answer is made containing new matter, the plaintiff may, on the trial or other proceedings, avail himself of any valid objection to its sufficiency, or may countervail it by evidence either in direct denial or by way of avoidance.

History: Laws 1884, ch. 1, § 44; C.L. 1884, § 1999; C.L. 1897, § 2767; Code 1915, § 3419; C.S. 1929, § 86-109; 1941 Comp., § 26-110; 1953 Comp., § 22-12-10.

ANNOTATIONS

Answer may assign legal reasons for defense and plead facts. — The answer to an alternative writ of mandamus under our statutes may assign any legal reasons upon which respondent relies to defeat the writ, as well as plead the facts on which he relies. State ex rel. Garcia v. Bd. of Comm'rs, 21 N.M. 632, 157 P. 656 (1916).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Mandamus §§ 441, 442.

55 C.J.S. Mandamus §§ 282 to 284.

44-2-11. [Pleadings allowed; proceedings as in civil actions.]

No other pleading or written allegation is allowed than the writ and answer. They shall be construed and amended in the same manner as pleadings in a civil action, and the issues thereby joined shall be tried and further proceedings had in the same manner as in a civil action.

History: Laws 1884, ch. 1, § 45; C.L. 1884, § 2000; C.L. 1897, § 2768; Code 1915, § 3420; C.S. 1929, § 86-110; 1941 Comp., § 26-111; 1953 Comp., § 22-12-11.

ANNOTATIONS

Cross references. — For contents of the writ, see 44-2-6 NMSA 1978.

As to construction of pleadings, see Rule 1-008F NMRA.

For amended and supplemental pleadings, see Rule 1-015 NMRA.

For the rules regulating trials, see Rules 1-038 to 1-053 NMRA.

Writ and answer only mandamus pleadings considered before supreme court. — On a petition for writ of mandamus under original jurisdiction of the supreme court, the pleadings to be considered are the petitioner's alternative writ of mandamus and the answer by the respondent. State ex rel. Heron v. Kool, 47 N.M. 218, 140 P.2d 737 (1943).

Case must be tried on writ and answer. — The complaint itself drops out of the picture and the writ must contain allegations of all facts necessary to authorize the relief sought. Furthermore, allegations in the writ should be made as in ordinary actions. Hence, the usual rules applicable in testing the sufficiency of a complaint in an ordinary civil action apply. The facts should be pleaded with the same certainty, neither more nor less. Laumbach v. Bd. of Cnty. Comm'rs, 60 N.M. 226, 290 P.2d 1067 (1955).

Pleadings are to be construed as in ordinary civil actions. State ex rel. Garcia v. Bd. of Comm'rs, 21 N.M. 632, 157 P. 656 (1916).

Writ must allege facts necessary to authorize relief sought. — Alfred v. Anderson, 86 N.M. 227, 522 P.2d 79 (1974).

Fact allegations in application form no part of writ. — Allegations of fact in an application for alternative writ of mandamus form no part of the writ and ordinarily cannot be so considered in determining the legal sufficiency of the writ. Mora Cnty. Bd. of Educ. v. Valdez, 61 N.M. 361, 300 P.2d 943 (1956).

Unless respondent answers allegations as though they were in writ. — Where respondent answers the allegations in the application, treating them as though contained in the alternative writ, they should be treated as supplementing those contained in the writ. Allegations of fact should be pleaded with the same certainty as in ordinary actions. State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P. 242 (1926).

Time extension and leave to amend freely given when necessary. — While office of mandamus is to afford a speedy remedy and to avoid delay, this does not mean that the

court is without power to extend the time within which a respondent may answer, or that the answer may not be amended, and leave to amend should be freely given when justice demands. State ex rel. Fitzhugh v. City Council of Hot Springs, 56 N.M. 118, 241 P.2d 100 (1952).

Legal objections raised by answer only. — The issues in mandamus are created solely by and are limited to the allegations of the writ and the answer thereto. Legal objections must be raised by the answer and, where the defense of abandonment of the suit after judgment was not in the pleadings, it could not have been considered or passed upon by the trial court. State ex rel. State Hwy. Comm'n v. Quesenberry, 72 N.M. 291, 383 P.2d 255 (1963).

Issues must be raised by answer. — In mandamus to compel levy of tax to satisfy judgment on certificates of indebtedness, issues, requiring allegations of fact pleaded in bar should have been raised by answer and not by demurrer (now motion) to alternative writ. State ex rel. Chesher v. Beall, 41 N.M. 652, 73 P.2d 329 (1937).

Court may construe pleading raising legal questions as answer. — Though a motion to dismiss is not an appropriate pleading in mandamus, the court may construe a pleading which raises legal questions as an answer, admitting the facts stated therein and invoking the court's application of the law thereto. State ex rel. Fitzhugh v. City Council of Hot Springs, 56 N.M. 118, 241 P.2d 100 (1952).

With exception of pleadings mandamus tried as other civil actions. — Mandamus is a civil action, and, with the exception of the pleadings, is tried and proceeded with in the same manner as other civil actions. The writ and the return constitute all the pleadings which shall be allowed. If the writ does not state sufficient grounds to authorize it, the respondent might demur (now move) thereto, and thus raise a question of law, which, if overruled by the court, would be such a final judgment as would authorize him to appeal. Eldodt v. Territory ex rel. Vaughn, 10 N.M. 141, 61 P. 105 (1900); Conklin v. Cunningham, 7 N.M. 445, 38 P. 170 (1894); Perez v. Barber, 7 N.M. 223, 34 P. 190 (1893).

Appeal dismissed where required procedures in mandamus proceedings not followed. — Alfred v. Anderson, 86 N.M. 227, 522 P.2d 79 (1974).

Jury trial not necessary preliminary to valid judgment. — Determination of the facts by a jury in a mandamus case is not a necessary preliminary to a valid judgment. Delgado v. Chavez, 5 N.M. 646, 25 P. 948, aff'd, 140 U.S. 586, 11 S. Ct. 874, 35 L. Ed. 578 (1891); Territory ex rel. Lewis v. Bd. of Cnty. Comm'rs, 5 N.M. (Gild., E.W.S. ed.) 1, 16 P. 855 (1888).

Inconsistencies in mandamus and quo warranto proceedings grounds for quashing. — The denial in proceedings by mandamus that the plaintiff therein was a de facto sheriff, while maintaining, as he must, in a collateral proceeding by way of quo warranto, that the same person was de facto in charge of the office, was so inconsistent

that the return containing the denial could have been quashed for this reason alone. Conklin v. Cunningham, 7 N.M. 445, 38 P. 170 (1894).

Amicus curiae cannot raise constitutionality where party fails to. — An amicus curiae is not a party and cannot assume the functions of a party; he must accept the case before the court with the issues made by the parties, and if the constitutionality of a statute is not raised by a party claiming to be adversely affected, the amicus curiae cannot do so. State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P. 242 (1926).

Law reviews. — For article, "Mandamus in New Mexico," see 4 N.M. L. Rev. 155 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Mandamus § 413.

55 C.J.S. Mandamus § 257.

44-2-12. [Judgment for plaintiff; damages; costs; peremptory writ.]

If judgment is given for the plaintiff, he shall recover the damages which he has sustained, together with costs and disbursements, and a peremptory mandamus shall be awarded without delay.

History: Laws 1884, ch. 1, § 46; C.L. 1884, § 2001; C.L. 1897, § 2769; Code 1915, § 3421; C.S. 1929, § 86-111; 1941 Comp., § 26-112; 1953 Comp., § 22-12-12.

ANNOTATIONS

Attorney fees incurred by an employee in a mandamus action to compel the employee's governmental employer to appoint independent defense counsel to defend the employee pursuant to the Tort Claims Act are not recoverable by the employee under this section. Paz v. Tijerina, 2007-NMCA-109, 142 N.M. 391, 165 P.3d 1167.

Section permits damage award in conjunction with granting of a peremptory writ of mandamus. The trial court having denied the writ, appellant cannot recover damages. N.M. Bus Sales v. Michael, 68 N.M. 223, 360 P.2d 639 (1961).

Attorney fees are not recoverable as a part of the damages sustained, or costs and disbursements, under this section. State ex rel. Roberson v. Bd. of Educ., 70 N.M. 261, 372 P.2d 832 (1962).

This section does not mean that appeal lies from "judgment" granting writ of mandamus if the issue of damages has not been resolved. Vill. of Los Ranchos v. Sanchez, 2004-NMCA-128, 136 N.M. 528, 101 P.3d 339, cert. denied, 2004-NMCERT-011, 136 N.M. 656, 103 P.3d 580.

Law reviews. — For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Mandamus §§ 357, 495 to 498.

Allowance of damages to successful plaintiff or relator in mandamus, 73 A.L.R.2d 903, 34 A.L.R.4th 457.

Allowance of attorney's fees in mandamus proceedings, 34 A.L.R.4th 457.

55 C.J.S. Mandamus §§ 342, 375 to 379.

44-2-13. [Officer or board refusing to perform duty; fine; other action for penalty barred.]

Whenever a peremptory mandamus is directed to a public officer, body or board, commanding the performance of any public duty specially enjoined by law, if it appears to the court that such officer or any member of such body or board, without just excuse, refuses or neglects to perform the duty so enjoined, the court may impose a fine not exceeding two hundred and fifty dollars [($250)] upon every such officer or member of such body or board; such fine, when collected, shall be paid into the state treasury, and the payment of such fine is a bar to an action for any penalty incurred by such officer or member of such body or board, by reason of his refusal or neglect to perform the duty so enjoined.

History: Laws 1884, ch. 1, § 47; C.L. 1884, § 2002; C.L. 1897, § 2770; Code 1915, § 3422; C.S. 1929, § 86-112; 1941 Comp., § 26-113; 1953 Comp., § 22-12-13.

ANNOTATIONS

This section does not exclude power of court to punish for disobedience of the writ, or to compel obedience to the writ by imprisonment until compliance. Delgado v. Chavez, 5 N.M. 646, 25 P. 948, aff'd, 140 U.S. 586, 11 S. Ct. 874, 35 L. Ed. 578 (1891).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Mandamus § 482.

Contempt for disobedience of mandamus, 30 A.L.R. 148.

55 C.J.S. Mandamus §§ 359, 360.

44-2-14. [Review of proceedings.]

That in all cases of proceedings by mandamus in any district court of this state, the final judgment of the court thereon shall be reviewable by appeal or writ of error in the same manner as now provided by law in other civil cases.

History: Laws 1887, ch. 60, § 1; C.L. 1897, § 2773; Laws 1899, ch. 80, § 8; Code 1915, § 3424; C.S. 1929, § 86-114; 1941 Comp., § 26-114; 1953 Comp., § 22-12-14.

ANNOTATIONS

Cross references. — As to appeals and writs of error generally, see Rules 12-201 to 12-216, and 12-501 to 12-505, NMRA.

Supreme Court of New Mexico may modify judgment of district court in mandamus on appeal. Territory ex rel. Coler v. Bd. of Cnty. Comm'rs, 14 N.M. 134, 89 P. 252 (1907), aff'd, 215 U.S. 296, 30 S. Ct. 111, 54 L. Ed. 202 (1909).

Jurisdiction over mandamus parties. — Where a mandamus proceeding is consolidated with a district court appeal from a decision of the personnel board, the court of appeals has jurisdiction over the mandamus parties. State ex rel. N.M. State Hwy. Dep't v. Silva, 98 N.M. 549, 650 P.2d 833 (Ct. App. 1982).

The legislature precluded an appeal from a judgment granting a writ of mandamus if the issue of damages has not been resolved by enacting, in 1897, the language of this section. Vill. of Los Ranchos v. Sanchez, 2004-NMCA-128, 136 N.M. 528, 101 P.3d 339, cert. denied, 2004-NMCERT-011, 135 N.M. 656, 103 P.3d 580.

Order quashing peremptory writ of mandamus was not a final, appealable order where the writ directed the respondent public official to answer the petition for writ and where the answer raised issues of fact which the court had to resolve to determine if the public official had a clear duty to perform a ministerial act and whether he was performing that act. Mimbres Valley Irrigation Co. v. Salopek, 2006-NMCA-093, 140 N.M. 168, 140 P.3d 1117.

Issuance of writ of mandamus was not final order for purposes of appellate review because it did not resolve the issue of damages requested by the petitioners. Vill. of Los Ranchos v. Sanchez, 2004-NMCA-128, 136 N.M. 528, 101 P.3d 339, cert. denied, 2004-NMCERT-011, 135 N.M. 656, 103 P.3d 580.

Direct appeals. — District court mandamus orders, requiring hearings in the lower courts, are reviewed as direct appeals. Collado v. N.M. Motor Vehicle Div., 2005-NMCA-056, 137 N.M. 442, 112 P.3d 303.

Law reviews. — For article, "Mandamus in New Mexico," see 4 N.M. L. Rev. 155 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Mandamus § 490.

Stay or supersedeas on appellate review in mandamus proceeding, 88 A.L.R.2d 420.

55 C.J.S. Mandamus § 362.

ARTICLE 3
Quo Warranto

44-3-1. [Commencement of proceedings; complaint; writ permissive.]

The remedies heretofore obtainable by writ of quo warranto and by proceedings by information in the nature of quo warranto shall be commenced by the filing of a complaint as in other civil actions, and it shall not be necessary to sue out such writs in form, but this section shall not prevent nor be construed to prohibit the use by the supreme court and the district courts of the state of writs and proceedings in the forms hitherto used in such cases by such courts.

History: Laws 1919, ch. 28, § 1; C.S. 1929, § 115-101; 1941 Comp., § 26-201; 1953 Comp., § 22-15-1.

ANNOTATIONS

Cross references. — As to extraordinary writs in exercise of supreme court's original jurisdiction, see Rule 12-504 NMRA.

Quo warranto is an ancient common-law writ, the origins of which are obscured by time. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Quo warranto statutes liberally construed to effectuate purpose. — Statutes such as those concerning quo warranto are remedial in character, and as such should be liberally interpreted to effectuate the objects intended. One of the primary purposes of quo warranto is to ascertain whether one is constitutionally authorized to hold the office he claims, whether by election or appointment, and the supreme court must liberally interpret the quo warranto statutes to effectuate that purpose. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Writ of quo warranto is a writ of grace and not of right. De Vigil v. Stroup, 15 N.M. 544, 110 P. 830 (1910) (decided under former law).

Statutory remedy for contest of elections superseded quo warranto. — Statutory remedy for contest of elections to public office has superseded quo warranto, but in other respects the remedy at common law and under the statute is in force. Orchard v. Bd. of Comm'rs, 42 N.M. 172, 76 P.2d 41 (1938); State ex rel. Abercrombie v. Dist. Court, 37 N.M. 407, 24 P.2d 265 (1933).

Remedy of quo warranto may be invoked against municipal corporations, or quasi-municipal corporations, as well as private corporations, to oust them from the usurpation of a franchise or power not authorized by the charter or the laws under which they are organized. Orchard v. Bd. of Comm'rs, 42 N.M. 172, 76 P.2d 41 (1938).

Consolidated rural school district is not a municipal corporation. — A consolidated rural school district was not a de facto or quasi-municipal corporation so that it would fall within the doctrine that quo warranto is the sole remedy for attacking existence of a corporation. Thrall v. Grant County Bd. of Educ., 38 N.M. 358, 33 P.2d 908 (1934).

Proceedings must be brought in name of state. — A private person may not bring proceedings by quo warranto to contest a state office; they must be brought in the name of the state. State ex rel. Hannett v. Dist. Court, 30 N.M. 300, 233 P. 1002 (1925).

Proceeding goes only to removing intruder from office. — A private person cannot have writ of quo warranto to adjudicate his title to an office. The proceeding in the nature of quo warranto goes only to removing the intruder. De Vigil v. Stroup, 15 N.M. 544, 110 P. 830 (1910) (decided under former law).

Court cannot on its own initiative remove officer for misconduct. — Such a proceeding can only be brought by one having the requisite interest therein or the statutory right or authority. State ex rel. White v. Clevenger, 69 N.M. 64, 364 P.2d 128 (1961).

Quo warranto proceeding against district judge purely personal. — A proceeding in quo warranto against a district judge is a proceeding to inquire into his right to hold office and has only incidental reference to any official action. The proceeding is purely personal. State ex rel. Holloman v. Leib, 17 N.M. 270, 125 P. 601 (1912) (decided under former law).

Special tax attorney not public officer. — Writ may not be used to test the legal right of a member of the New Mexico house of representatives to be employed as special tax attorney, since such attorney is not a public officer. State ex rel. Gibson v. Fernandez, 40 N.M. 288, 58 P.2d 1197 (1936).

Right of one claiming election as acequia commissioner to proceed under this act is not affected by Laws 1921, ch. 129 (73-2-14, 73-3-3 NMSA 1978). State ex rel. Besse v. Dist. Court, 31 N.M. 82, 239 P. 452 (1925).

Jurisdiction of quo warranto proceedings is in the district court, although it does not determine the character of the proceeding. Territory ex rel. Wade v. Ashenfelter, 4 N.M. (Gild.) 93, 12 P. 879 (1887), appeal dismissed, 154 U.S. 493, 14 S. Ct. 1141, 38 L. Ed. 1079 (1893) (decided under former law).

Legislation which affects constitutionally vested judicial power not binding. — Since the constitution provides for separate and equal branches of government in New Mexico, any legislative measure which affects pleading, practice or procedure in relation to a power expressly vested by the constitution in the judiciary, such as quo warranto, cannot be deemed binding. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Quo Warranto §§ 86 to 88.

Right of corporation to act as relator in information in the nature of quo warranto, 1 A.L.R. 197.

Quo warranto as proper remedy to enforce forfeiture of street railway franchise, 34 A.L.R. 1425.

Quo warranto as a remedy for violation of criminal or penal statute by corporation, 53 A.L.R. 1038.

Quo warranto to protect corporation against use of name by another corporation, 66 A.L.R. 1026, 72 A.L.R.3d 8.

Practice of law by corporation as ground for quo warranto, 73 A.L.R. 1336, 105 A.L.R. 1376, 157 A.L.R. 310.

Quo warranto to test result of primary election, 86 A.L.R. 246.

Quo warranto to test right to serve as grand or petit juror, 91 A.L.R. 1009.

Holding or parent corporation as a necessary or proper party to a quo warranto proceeding against subsidiary corporation, 106 A.L.R. 1188.

Quo warranto as remedy in field of taxation, 109 A.L.R. 324.

Quo warranto to oust incumbent of public office, based on misconduct or other ground of forfeiture, 119 A.L.R. 725.

Power of district, county or prosecuting attorney to bring action of quo warranto, 153 A.L.R. 899.

Corporation as necessary or proper party defendant in proceedings to determine validity of election or appointment of corporate director or officer, 21 A.L.R.2d 1048.

Statute of limitations or laches as applied to quo warranto proceedings, 26 A.L.R.2d 828.

Right to maintain quo warranto proceedings to test title to or existence of public office by private person not claiming office, 51 A.L.R.2d 1306.

74 C.J.S. Quo Warranto § 34.

44-3-2. [Trial; time; use of jury permissive.]

Actions of quo warranto shall be set down and summarily tried as soon as the issues are made up and the court shall have power, if he deems proper, to summon a jury for the purpose and prescribe the manner of summoning the same.

History: Laws 1919, ch. 28, § 2; C.S. 1929, § 115-102; 1941 Comp., § 26-202; 1953 Comp., § 22-15-2.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Quo Warranto §§ 108 to 111.

74 C.J.S. Quo Warranto §§ 44, 46.

44-3-3. [Name of private relator to be shown.]

When an action shall be brought by the attorney general or district attorney by virtue of this chapter [44-3-1 to 44-3-16 NMSA 1978], on the relation or information of a person or persons, having an interest in the question, the name of such person shall be joined with the state as relator.

History: Laws 1919, ch. 28, § 3; C.S. 1929, § 115-103; 1941 Comp., § 26-203; 1953 Comp., § 22-15-3.

ANNOTATIONS

Proceedings must be brought in name of state. — Quo warranto proceedings to contest a state office must be brought in the name of the state. State ex rel. Hannett v. Dist. Court, 30 N.M. 300, 233 P.2d 1002 (1925).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Quo Warranto §§ 61, 62, 64.

Right of corporation to act as relator in information in the nature of quo warranto, 1 A.L.R. 197.

74 C.J.S. Quo Warranto §§ 25, 27.

44-3-4. [Who may bring action; private relators; when action lies.]

An action may be brought by the attorney general or district attorney in the name of the state, upon his information or upon the complaint of any private person, against the parties offending in the following cases:

A. when any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office or offices in a corporation created by authority of this state; or,

B. when any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall work a forfeiture of his office; or,

C. when any association or number of persons shall act, within this state, as a corporation without being duly incorporated, or in case of a foreign corporation, without being duly authorized, to do business within this state.

The district attorneys in their respective judicial districts shall exercise the same power and right given by this section to the attorney general in cases which may be limited in their operation to the said district.

When the attorney general or district attorney refuses to act, or when the office usurped pertains to a county, incorporated village, town or city, or school district, such action may be brought in the name of the state by a private person on his own complaint.

History: Laws 1919, ch. 28, § 4; C.S. 1929, § 115-104; 1941 Comp., § 26-204; 1953 Comp., § 22-15-4.

ANNOTATIONS

Cross references. — For other annotations applicable to this section, see 44-3-1 NMSA 1978.

As to existing election contest provisions being unaffected by quo warranto provisions, see 44-3-15 NMSA 1978 and notes thereto.

As to quo warranto proceedings against a corporation for violation of act regulating financing of automobiles, see 57-11-7 NMSA 1978.

I. GENERAL CONSIDERATION.

Impeachment does not preempt quo warranto. — Impeachment by the legislature does not preempt quo warranto as the exclusive means for removing a felon from public office. State ex rel. King v. Sloan, 2011-NMSC-020, 149 N.M. 620, 253 P.3d 33.

Action lies to contest constitutionality of judge's appointment. — Where respondent was elected to the New Mexico senate at the general election held November 3, 1970 for a four-year term, during which the salaries of district judges were increased by $7000 per annum, and was again a successful candidate for election to the New Mexico senate at the general election held November 5, 1974, but was appointed by the governor to the district bench before he qualified and prior to the

commencement of the 1975 legislative session, it was held in a quo warranto proceeding that respondent's appointment to the office of district judge was in violation of N.M. Const., art. IV, § 28 and was accordingly invalid. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Proceedings not place to question statute's constitutionality where respondent accepted benefits. — Respondent senator, who at no time questioned the constitutionality of the 1972 Senate Reapportionment Act (former Sections 2-8-1 to 2-8-53 NMSA 1978) or the district court decree which held he did not have to run again in 1972, and enjoyed the benefit of the law which allowed him to retain his position without contest in 1972, would not be heard to question its propriety in quo warranto proceedings, challenging his right to be a district judge; a de facto officer is estopped from taking advantage of his own want of title. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

II. WHO BRINGS ACTION.

State, through attorney general, is indispensable party plaintiff in quo warranto proceeding to challenge the propriety of an election contest, since a private person cannot have the writ to adjudicate his title to an office, and, indeed, the proceeding in the nature of a quo warranto goes only to removing the intruder, and no further. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Court cannot on its own initiative remove officer for misconduct. Such a proceeding can only be brought by one having the requisite interest therein or the statutory right or authority. State ex rel. White v. Clevenger, 69 N.M. 64, 364 P.2d 128 (1961).

Lack of jurisdiction where indispensable party not joined in action. — In an action in quo warranto challenging the validity of special zoning districts, where the county commissioners are an indispensable party and are not joined, the trial court lacks jurisdiction to adjudicate the merits of plaintiffs' quo warranto action. State ex rel. Huning v. Los Chavez Zoning Comm'n, 93 N.M. 655, 604 P.2d 121 (1979).

Court without jurisdiction unless attorney general can sue. — Unless the attorney general has the right and capacity to maintain the action, the court is without jurisdiction. State ex rel. White v. Clevenger, 69 N.M. 64, 364 P.2d 128 (1961).

District attorney may test corporation's statewide authority. — The district attorney would have authority to bring a quo warranto action to test statewide authority of a corporation. State ex rel. Attorney Gen. v. Reese, 78 N.M. 241, 430 P.2d 399 (1967).

III. PRIVATE RELATORS.

Private party may act when statutory requirements met. — Unless statutory requirements are met, there is no authority in a private person to make application. State ex rel. Hannett v. Dist. Court, 30 N.M. 300, 233 P. 1002 (1925).

Private party may act when district attorney refuses. — This section authorizes a private person to institute action in the name of the state, claiming election to office of acequia commissioner, the district attorney having refused to act. State ex rel. Besse v. Dist. Court, 31 N.M. 82, 239 P. 452 (1925).

IV. WHEN ACTION LIES.

Felony conviction occurring during the term of an elective office. — Quo warranto is an appropriate procedure for removing an elected official when the elected official is convicted of a felony during the elected official's term of office. State ex rel. King v. Sloan, 2011-NMSC-020, 149 N.M. 620, 253 P.3d 33.

Action proper when officer said to forfeit office. — Where the acts of an officer are said to work a forfeiture of the office, ipso facto, quo warranto is a proper remedy. State ex rel. Martinez v. Padilla, 94 N.M. 431, 612 P.2d 223 (1980).

Action proper where misuse of money. — Where public officers are disqualified for misuse of public funds, the court has jurisdiction to remove them by a writ of quo warranto. State ex rel. Martinez v. Padilla, 94 N.M. 431, 612 P.2d 223 (1980).

When requirement for quo warranto not met. — Where there has been no showing that the attorney general of this state has refused to act on behalf of the private litigant plaintiffs, the statutory requirement for quo warranto has not been met, and there is no authority in the plaintiffs to file an application in quo warranto. State ex rel. Huning v. Los Chavez Zoning Comm'n, 93 N.M. 655, 604 P.2d 121 (1979).

Office of commissioner of special zoning district commission is "public office" for which an action lies in quo warranto. State ex rel. Huning v. Los Chavez Zoning Comm'n, 93 N.M. 655, 604 P.2d 121 (1979).

Quo warranto to ascertain whether public officer constitutionally and legally authorized to perform any act in or exercise any functions of the office to which he lays claim. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Problems involving legal title to office are germane only in a proceeding by quo warranto. Conklin v. Cunningham, 7 N.M. 445, 38 P. 170 (1894) (decided under former law).

Misconduct of officer does not of itself amount to forfeiture of the office. An officer rightfully in office can only be removed for misconduct in a proper proceeding. State ex rel. White v. Clevenger, 69 N.M. 64, 364 P.2d 128 (1961).

Quo warranto is not cumulative remedy or one in addition to any special statutory remedy for contesting elections contained in the Election Code. State v. Rodriguez, 65 N.M. 80, 332 P.2d 1005 (1958).

Statutory remedy for contesting elections to public office is exclusive, and has superseded quo warranto. Orchard v. Bd. of Comm'rs, 42 N.M. 172, 76 P.2d 41 (1938) (decided under former election laws).

If other election provision applies, quo warranto not available. — Quo warranto is no longer available to an unsuccessful candidate if the contest procedure established by the Election Code applies to the public office in question. State v. Rodriguez, 65 N.M. 80, 332 P.2d 1005 (1958) (decided under former Election Code).

Writ lies if no other statutory provision exists. — Quo warranto was a proper action to bring since there was no provision in the Election Code or other related statutes providing for contests for municipal school board elections. State v. Rodriguez, 65 N.M. 80, 332 P.2d 1005 (1958) (decided under former Election Code).

Writ used to test right to land grant trusteeship. — The writ may be used to test the right to the office of trustee of the Tecolote land grant. State ex rel. Valdez v. Moise, 42 N.M. 280, 76 P.2d 1155 (1938).

Writ not used when questioned office not public. — The position of special tax attorney is not a public office, and quo warranto is not the proper proceeding to test the right of an individual to hold that position at the same time he is a member of the state legislature. State ex rel. Gibson v. Fernandez, 40 N.M. 288, 58 P.2d 1197 (1936).

Language refers to officer's right to act not actions. — The term employed in the statute, "unlawfully hold or exercise . . . any office . . . in a corporation," refers to the right of one to act as an officer and not to the acts of the officer in the discharge of his duties, where such acts do not ipso facto operate as, or amount to, a forfeiture of the office. State ex rel. White v. Clevenger, 69 N.M. 64, 364 P.2d 128 (1961).

Writ not proper remedy unless acts amount to forfeiture. — Quo warranto is not a proper remedy to test the legality of the acts of an officer or his misconduct in office, nor to compel, restrain or obtain a review of such acts unless they amount to a forfeiture of the office, where neither the title to the office nor the right to a franchise is involved. State ex rel. White v. Clevenger, 69 N.M. 64, 364 P.2d 128 (1961).

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Quo Warranto §§ 12 to 48, 60 to 64.

Right of corporation to act as relator in information in the nature of quo warranto, 1 A.L.R. 197.

Teacher as an officer whose right may be tested by quo warranto, 30 A.L.R. 1423.

Quo warranto as proper remedy to enforce forfeiture of franchise, 34 A.L.R. 1425.

Condemnation by de facto corporation, right of landowner to question by quo warranto legality of corporate existence, 44 A.L.R. 555.

Practice of law by corporation as ground for quo warranto, 73 A.L.R. 1336, 105 A.L.R. 1376, 157 A.L.R. 310.

Holding or parent corporation as necessary or proper party to quo warranto proceeding against subsidiary corporation, 106 A.L.R. 1188.

Power of district, county or prosecuting attorney to bring action of quo warranto, 131 A.L.R. 1207, 153 A.L.R. 899.

Right to maintain quo warranto proceedings to test title to or existence of public office by private person not claiming office, 51 A.L.R.2d 1306.

Remedy for determining right or title to office in unincorporated private association, 82 A.L.R.2d 1172.

74 C.J.S. Quo Warranto §§ 6 to 14, 25 to 31.

If attorney general refuses to act then citizen can. — Under this section, quo warranto proceedings cannot be instituted for the removal of a public officer by a private citizen unless the attorney general refuses to bring such action. 1939-40 Op. Att'y Gen. 40-3410.

44-3-5. [Cost bond to be posted by private relator.]

Before any writ shall issue in an action brought upon the complaint or information of a private relator under the provisions of this act [44-3-1 to 44-3-16 NMSA 1978], such private person shall file with the clerk of the court issuing such writ a cost bond in an amount to be fixed by the court, executed and acknowledged as required by law in the case of supersedeas bonds on appeal, to be approved by the clerk of said court, conditioned as now required by law in the case of cost bonds in the district court.

History: Laws 1919, ch. 28, § 5; C.S. 1929, § 115-105; 1941 Comp., § 26-205; 1953 Comp., § 22-15-5.

ANNOTATIONS

Failure to give cost bond will not defeat jurisdiction where the defendant has made a general appearance. State ex rel. Besse v. Dist. Court, 31 N.M. 82, 239 P. 452 (1925).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Quo Warranto § 59.

74 C.J.S. Quo Warranto § 17.

44-3-6. [Usurpation of office; allegations in complaint; compensation of defendant; bond; injunction.]

Whenever such action shall be brought against a person for usurping an office, the attorney general, district attorney or person complaining, in addition to the statement of the cause of action, shall also set forth in the complaint the name of the person rightfully entitled to the office with a statement of his right thereto, and in such cases, upon proof by affidavit that the defendant has received or is about to receive the fees and emoluments of the office by virtue of his usurpation thereof, the judge of the district court wherein such proceeding is pending, or a justice of the supreme court, if the proceeding be therein pending, may by order require the defendant to furnish a good and sufficient bond, within a designated time not exceeding fifteen days, executed and acknowledged as required by law in the case of supersedeas bonds on appeal, to be approved by said judge, conditioned that in case the person alleged to be entitled to the office should prevail, the defendant will repay to him all fees and emoluments of the office received by him and by means of his usurpation thereof, and in addition to said bond, or in case of a failure to give said bond, the said judge or justice shall upon good cause shown, issue a writ of injunction directed to the proper disbursing officer enjoining and restraining him from issuing to the defendant or his assigns any warrant, check, certificate or certificates of indebtedness representing fees or emoluments of said office, until the final adjudication of said cause.

History: Laws 1919, ch. 28, § 6; C.S. 1929, § 115-106; 1941 Comp., § 26-206; 1953 Comp., § 22-15-6.

ANNOTATIONS

Supreme court would not give approval to portion of this section which requires the name of the person rightfully entitled to the office involved in a quo warranto proceeding to be set forth in the complaint, at least not if it is meant to affect the subject matter jurisdiction of the court, especially since the statute is inconsistent with Rule 12(a), N.M.R. App. P. (Civ.) (now Rule 1-012A NMRA), since in any situation where a vacancy was filled by appointment under such reasoning the court would be shorn of its constitutional powers vis-a-vis quo warranto, and presumably, with additional bits of legislative ingenuity, of its powers to issue other extraordinary writs as well; such could

not have been the intention of the people when N.M. Const., art. III, § 1 and art. VI, § 3 were adopted. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Requirement of name of person rightfully entitled to office procedural. — The supreme court has power and authority to hear and determine quo warranto cases and to grant relief. There is thus no question at all concerning its jurisdiction. The statutory provision requiring the name of the person rightfully entitled to the office to be set forth in the complaint is clearly procedural. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Quo Warranto § 89.

Teacher as an officer whose right may be tested by quo warranto, 30 A.L.R. 1423.

Quo warranto to test results of primary election, 86 A.L.R. 246.

Quo warranto to try title or right to office connected with administration of tax statute, 109 A.L.R. 330.

74 C.J.S. Quo Warranto §§ 7, 37.

44-3-7. [Right to elective office; allegations concerning election.]

In all actions brought to determine the right to any office it shall be necessary for the plaintiff or relator whenever the defendant is in possession of the office in controversy under a certificate of election issued by the proper officer or board of canvassers, to state in his complaint in what respect such certificate was improperly or illegally issued; and in case it is claimed that the relator received a majority of legal votes cast for the office at any legal election to fill such office he shall also state in such complaint the number of legal votes cast, as far as he may be able so to do, for the relator and for the defendant for such office respectively, and also the number of votes cast for the relator and for the defendant respectively for such office, as determined by the legal canvass of such election.

History: Laws 1919, ch. 28, § 7; C.S. 1929, § 115-107; 1941 Comp., § 26-207; 1953 Comp., § 22-15-7.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Quo Warranto § 89.

Admissibility of election ballots in quo warranto proceedings, 71 A.L.R.2d 353.

44-3-8. [Time of hearing demurrer, amending complaint, filing answer and trial; application for continuance.]

If a demurrer to the complaint in such actions be filed by the defendant the same shall be heard and determined within six days from the date of service of a copy upon counsel for the plaintiff and relator, and if the demurrer is sustained, plaintiff and relator will be given not to exceed five days to amend the complaint, and if it is overruled then the defendant shall have a like time to file the answer, provided that upon good cause shown the court may extend the time of either party, but in no event shall the time be extended to either party more than four days. The issue as finally made shall stand for trial forthwith; and no continuance of any such cause shall be granted upon the application of either party unless he shall show the absence of a witness or other testimony and they shall be deemed material by the court. The plaintiff or relator may traverse or offer counter evidence to the facts set forth in such application for continuance.

History: Laws 1919, ch. 28, § 8; C.S. 1929, § 115-108; 1941 Comp., § 26-208; 1953 Comp., § 22-15-8.

ANNOTATIONS

Cross references. — For the abolition of demurrers except in special statutory proceedings where the existing rules conflict, see Rules 1-001 and 1-007C NMRA.

Erroneous for court overruling demurrer to render final judgment. — It is a fundamental rule of law that it is ordinarily erroneous for a court on overruling a demurrer (now a motion) to render final judgment. State v. Rodriguez, 65 N.M. 80, 332 P.2d 1005 (1958).

No provisions for demurrer to amended complaint which is sustained. — This statute makes no provisions for a case where the amended complaint has been filed, followed by a second demurrer (now a motion) which is sustained and an appeal taken to the supreme court. State v. Rodriguez, 65 N.M. 80, 332 P.2d 1005 (1958).

If second demurrer overruled on appeal, time to answer given. — Where an amended complaint was filed in quo warranto action, and second demurrer (now a motion) thereto was sustained, and, on appeal to supreme court, the demurrer (now a motion) was, in effect, overruled, defendants should be granted statutory time within which to answer. State v. Rodriguez, 65 N.M. 80, 332 P.2d 1005 (1958).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Quo Warranto §§ 95, 98.

74 C.J.S. Quo Warranto §§ 40, 41.

44-3-9. [Judgment; nature; expiration of term of office before rendition.]

In every case such judgment shall be rendered upon the right of the defendant and also upon the right of the party alleged to be entitled, or only upon the right of the

defendant, as justice may require. When the action shall not be terminated during the term of the office in controversy it may notwithstanding be prosecuted to completion and judgment rendered, which shall determine the right which any party had to the office, and to the fees and emoluments thereof.

History: Laws 1919, ch. 28, § 9; C.S. 1929, § 115-109; 1941 Comp., § 26-209; 1953 Comp., § 22-15-9.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Quo Warranto § 112.

74 C.J.S. Quo Warranto § 48.

44-3-10. [Judgment for relator claiming office; provisions for changing possession; enforcement; punishment for contempt.]

If the judgment be rendered in favor of the person so alleged to be entitled to the office, it shall provide that upon his qualification as required by law, he shall immediately thereafter demand of the defendant in the action all the books and papers and insignia of the office in his custody and control and that the defendant shall immediately comply therewith by turning over to him all of said books, papers and insignia of the office. If the defendant fails or in anywise refuses to comply with said demand, the plaintiff or relator shall have an order of the court in said proceeding citing the defendant as for contempt and directing him to show cause why he should not be punished therefor and, if upon the hearing it be shown that the defendant was guilty of disobeying such order, the court shall impose a fine of not less than one hundred ($100.00) dollars, and not more than one thousand ($1,000.00) dollars, or not less than thirty (30) days nor more than ninety (90) days in the county jail, or both such fine and imprisonment within the limits stated. In addition the court may direct the further imprisonment of the party in contempt until he complies with the order of the court. In addition to the foregoing such proceedings may be had as are provided for by law to compel the delivery of such papers, books and insignia of office.

History: Laws 1919, ch. 28, § 10; C.S. 1929, § 115-110; 1941 Comp., § 26-210; 1953 Comp., § 22-15-10.

ANNOTATIONS

Cross references. — As to contempt proceedings, see 34-1-2 to 34-1-5 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Quo Warranto §§ 114, 116, 120.

74 C.J.S. Quo Warranto §§ 48 to 50.

44-3-11. [Costs.]

The prevailing party in such proceedings may recover his costs from his opponent, provided that no costs shall be taxable against the state nor the attorney general when acting as relator, but such costs shall be taxable against and recovered from a private relator whenever the judgment is for the defendant.

History: Laws 1919, ch. 28, § 11; C.S. 1929, § 115-111; 1941 Comp., § 26-211; 1953 Comp., § 22-15-11.

ANNOTATIONS

Cross references. — For provision concerning costs in judgment finding defendant guilty of usurpation of office, see 44-3-14 NMSA 1978.

This section rather than civil rule governs costs. — In an action in quo warranto, the taxation of costs, other than the receivership costs, is governed by this section (costs in quo warranto proceedings) rather than by Rule 54(d), N.M.R. Civ. P. (now Rule 1-054D NMRA). White v. Clevenger, 71 N.M. 80, 376 P.2d 31 (1962).

This section exempts the state and attorney general from costs. State ex rel. Hannett v. Dist. Court, 30 N.M. 300, 233 P. 1002 (1925).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Quo Warranto §§ 118, 131.

74 C.J.S. Quo Warranto § 52.

44-3-12. [Judgment for relator claiming office; provisions concerning compensation; separate action for damages.]

When the judgment is for the person so alleged to be entitled to the office, he may have included therein a money judgment against the defendant and the surety or sureties on his bond, if furnished as in Section 6 [44-3-6 NMSA 1978] provided, for all fees and emoluments collected by him during the term involved in such case with interest thereon at six percent per annum; and he may recover by separate action the damages which he shall have sustained by reason of the usurpation by the defendant of the office from which by virtue of said judgment said defendant has been excluded.

History: Laws 1919, ch. 28, § 12; C.S. 1929, § 115-112; 1941 Comp., § 26-212; 1953 Comp., § 22-15-12.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Quo Warranto § 117.

44-3-13. [Joinder of defendants.]

When several persons claim to be entitled to the same office or franchise, or if they collectively claim to be entitled to exercise the franchise of a corporation created by the authority of this state, one action may be brought against all such persons in order to try their, and each of their, respective rights to such office or franchise.

History: Laws 1919, ch. 28, § 13; C.S. 1929, § 115-113; 1941 Comp., § 26-213; 1953 Comp., § 22-15-13.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Quo Warranto § 83.

74 C.J.S. Quo Warranto § 32.

44-3-14. [Judgment finding defendant guilty of usurpation of office; provisions concerning exclusion and costs.]

When a defendant against whom such action shall have been brought shall be adjudged guilty of usurping or intruding into or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise or privilege, and that the plaintiff recover costs against such defendant.

History: Laws 1919, ch. 28, § 14; C.S. 1929, § 115-114; 1941 Comp., § 26-214; 1953 Comp., § 22-15-14.

ANNOTATIONS

Cross references. — As to costs generally, see 44-3-11 NMSA 1978.

Quo warranto is not proper remedy to test alleged misconduct of a corporate officer as grounds for removal. White v. Clevenger, 71 N.M. 80, 376 P.2d 31 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Quo Warranto §§ 116 to 118.

74 C.J.S. Quo Warranto §§ 49, 50, 52.

44-3-15. [Election contest statutes unaffected.]

This act [44-3-1 to 44-3-16 NMSA 1978] shall not be construed to in any way affect the provisions of the statutes now in force in relation to election contests.

History: Laws 1919, ch. 28, § 15; C.S. 1929, § 115-115; 1941 Comp., § 26-215; 1953 Comp., § 22-15-15.

ANNOTATIONS

Compiler's notes. — Provisions for election contests, when this section was enacted, were codified as 2066 to 2080, 1915 Code. These provisions were subsequently repealed by Laws 1927, ch. 41, § 722 (the 1927 Election Code which has subsequently been repealed). For present provisions as to contest, see 1-14-1 to 1-14-21 NMSA 1978.

Quo warranto is not cumulative remedy or one in addition to any special statutory remedy for contesting elections contained in the Election Code. State v. Rodriguez, 65 N.M. 80, 332 P.2d 1005 (1958).

Section superseded by former Election Code. — Provisions relating to contest of elections in 1927 Election Code enacted after this section sets up an exclusive remedy and supersedes the remedy by statutory quo warranto. State ex rel. Abercrombie v. Dist. Court, 37 N.M. 407, 24 P.2d 265 (1933).

Statutory remedy for contesting elections to public office is exclusive, and has superseded quo warranto. Orchard v. Bd. of Comm'rs, 42 N.M. 172, 76 P.2d 41 (1938) (decided under former election laws).

If other election provision applies, quo warranto is not available. — Quo warranto is no longer available to an unsuccessful candidate if the contest procedure established by the Election Code applies to the public office in question. State v. Rodriguez, 65 N.M. 80, 332 P.2d 1005 (1958) (decided under former Election Code).

Writ lies if no other statutory provision exists. — Quo warranto was a proper action to bring since there was no provision in the Election Code or other related statutes providing for contests for municipal school board elections. State v. Rodriguez, 65 N.M. 80, 332 P.2d 1005 (1958) (decided under former Election Code).

44-3-16. [Speedy hearing on appeal.]

In case of an appeal the supreme court shall advance the case on the docket of said court so as to obtain the most speedy hearing possible.

History: Laws 1919, ch. 28, § 16; C.S. 1929, § 115-116; 1941 Comp., § 26-216; 1953 Comp., § 22-15-16.

ANNOTATIONS

Cross references. — As to appeals generally, see Rules 12-201 to 12-216 NMRA.

Section presupposes a right to appeal. — Although this article (Sections 44-3-1 to 44-3-16 NMSA 1978) does not provide for an appeal, it presupposes an appeal under this section. State ex rel. Besse v. Dist. Court, 31 N.M. 82, 239 P. 452 (1925).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Quo Warranto § 124.

Determination of issues of fact involved in original quo warranto proceedings in appellate court, 98 A.L.R. 237.

74 C.J.S. Quo Warranto § 51.

ARTICLE 4
Actions Against Receivers

(Repealed by Laws 1995, ch. 81, § 11.)

44-4-1 to 44-4-5. Repealed.

ANNOTATIONS

Repeals. — Laws 1995, ch. 81, § 11 repeals 44-4-1 to 44-4-5 NMSA 1978, relating to actions against receivers, effective June 16, 1995. For provisions of former sections, see 1978 Original Pamphlet. For present provisions relating to receivers, see Chapter 44, Article 8 NMSA 1978.

ARTICLE 5
Gambling Debts and Losses

44-5-1. [Money and property losses; loser's right of action for recovery; nature of remedy.]

Any person who shall lose any money or property at any game at cards, or at any gambling device, may recover the same by action of debt, if money; if property, by action of trover, replevin or detinue.

History: Laws 1856-1857, p. 34; C.L. 1865, ch. 36, § 1; C.L. 1884, § 2290; C.L. 1897, § 3199; Code 1915, § 2507; C.S. 1929, § 58-101; 1941 Comp., § 25-1001; 1953 Comp., § 22-10-1.

ANNOTATIONS

Cross references. — For deductions considered taxes, see 7-3-4 NMSA 1978.

For criminal statutes with respect to gambling, see 30-19-1 to 30-19-14 NMSA 1978.

For replevin generally, see 42-8-1 to 42-8-22 NMSA 1978.

These provisions were designed to discourage gambling. Wolford v. Martinez, 28 N.M. 622, 216 P. 499 (1923).

Courts will not aid the winner in the enforcement of contracts or in the recovery of money or property won through gambling devices, or wagers in violation of this section. Appleton v. Maxwell, 10 N.M. 748, 65 P. 158 (1901).

Recovery not barred because loser first suggested gaming. — The mere fact that plaintiff himself first suggested a game of poker does not deny him the benefit of this section. Snure v. Skipworth, 61 N.M. 340, 300 P.2d 792 (1956).

Coin flip to decide between two alternatives not gambling. — Agreement between vendor and purchaser of a mortgaged farm whereby a coin flip was used to determine whether or not purchase price would be reduced, but where regardless of outcome vendor would be relieved of obligation to pay penalty in the event that purchaser decided to pay off mortgage, was not void under the provisions of Sections 44-5-1 and 44-5-4 NMSA 1978 as being arrived at through gambling. This was no evil in the use of such coin flip for the purpose of determining which alternative should be applicable. (Because Sections 30-19-1 and 30-19-2 NMSA 1978 were not in effect at the time the agreement took place, the definitions of "bet" and "gambling device" as contained in those sections were not used in deciding this case) Garvin v. Hudson, 76 N.M. 403, 415 P.2d 369 (1966).

Bank on which debt payment check drawn is necessary party. — Bank as holder of the funds on which check in payment of an illegal gaming contract was drawn was a necessary party in proceeding brought by payee to cancel the check, as bank, had it cashed such check, would have been liable for the full amount. Teaver v. Miller, 53 N.M. 345, 208 P.2d 156 (1949).

When two or more confederate to "shear a lamb" at gaming, they render themselves jointly and severally liable under statutes such as this. Snure v. Skipworth, 61 N.M. 340, 300 P.2d 792 (1956).

Loss occurs when game played not at time of payment. — Where, in action to recover money lost at gambling device, it was in evidence that plaintiff did not settle the loss at the time of the play, but about six weeks later he gave a check which defendant cashed, the loss occurred at the time the game was played and not when the check was given or the money paid. Mann v. Gordon, 15 N.M. 652, 110 P. 1043 (1910).

Must prove defendant won and received payment through stakeholder. — In order to recover money under these provisions, it must be proved that defendant won said amount from the plaintiff and that he received said amount from the plaintiff through the stakeholder. Armstrong v. Aragon, 13 N.M. 19, 79 P. 291 (1905).

Winner's year-old losses to plaintiff cannot be set-off. — In action to recover money lost at gambling within one year prior to the bringing of the action, moneys won at gambling by plaintiff from defendant more than one year prior to the bringing of plaintiff's action could not be pleaded as a set-off or counterclaim. Mann v. Gordon, 15 N.M. 652, 110 P. 1043 (1910).

Uniform Negotiable Instruments Law did not modify these provisions. — There is no repugnancy between this law and the Uniform Negotiable Instruments Law (since repealed) which was not intended to modify these provisions concerning gambling. Farmers' State Bank v. Clayton Nat'l Bank, 31 N.M. 344, 245 P. 543 (1925).

Law reviews. — For article, "Approaching Statutory Interpretation in New Mexico," see 8 Nat. Resources J. 689 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gambling §§ 212, 213.

Right to recover money which plaintiff placed in hands of an agent to be used for gambling purposes, 3 A.L.R. 1635.

Accountability to owner of one who receives funds for "bucket shop" transaction from third person acting without authority, 35 A.L.R. 427.

Recovery of losses on horse races, 45 A.L.R. 1003.

Margin transactions or dealings in futures as within statutes providing for recovery back of money paid on gaming consideration, 49 A.L.R. 1085.

Rights and remedies in respect of money in gambling machine or other receptacle, used in connection with gambling, seized by public authorities, 79 A.L.R. 1007.

Right of professional gambler in action by casual gambler to recover losses, to set off money lost by him to casual gambler, 88 A.L.R. 1078.

Violation of statute relating to bucket shops or bucket shop transactions as ground of action by customer or patron, 113 A.L.R. 853.

Statute permitting specified forms of betting as affecting civil action on wagering contract, 117 A.L.R. 835.

Gambler's right to recover money lost by him as including money belonging to others, 162 A.L.R. 1224.

Rights and remedies in respect of property pledged for payment of gambling debt, 172 A.L.R. 701.

Recovery of money or property lost through cheating or fraud in forbidden gambling or game, 39 A.L.R.2d 1213.

Right of owner to recover his money gambled away by another without authority, 44 A.L.R.2d 1242.

Law or policy of forum against wagering transactions as precluding enforcement of claim based on gambling transaction valid under governing law, 71 A.L.R.3d 178.

Right to recover money lent for gambling purposes, 74 A.L.R.5th 369.

38 C.J.S. Gaming § 45 et seq.

44-5-2. [Contents of complaint.]

In such action it shall be sufficient for the plaintiff to declare generally as in actions for debt for money had and received for the plaintiff's use, or as in actions of trover or detinue for a supposed finding and the detaining or converting the property of the plaintiff to the use of the defendant whereby an action hath accrued to the plaintiff.

History: Laws 1856-1857, p. 36; C.L. 1865, ch. 36, § 2; C.L. 1884, § 2291; C.L. 1897, § 3200; Code 1915, § 2508; C.S. 1929, § 58-102; 1941 Comp., § 25-1002; 1953 Comp., § 22-10-2.

ANNOTATIONS

Cross references. — For the contents of a claim for relief, see Rule 1-008A NMRA.

Action is against party receiving thing wagered. — These provisions give a right of action not against the party theoretically winning the wager, but against one to whom the amount or thing wagered has been delivered. Armstrong v. Aragon, 13 N.M. 19, 79 P. 291 (1905).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gambling § 257.

38 C.J.S. Gaming § 62.

44-5-3. Action maintainable by spouse, children, heirs, executors, administrators and creditors or [of] loser.

The spouse, children, heirs, executors, administrators and creditors of the person losing may have the same remedy against the winner as provided in Sections 44-5-1 and 44-5-2 NMSA 1978.

History: Laws 1856-1857, p. 36; C.L. 1865, ch. 36, § 3; C.L. 1884, § 2292; C.L. 1897, § 3201; Code 1915, § 2509; C.S. 1929, § 58-103; 1941 Comp., § 25-1003; 1953 Comp., § 22-10-3; Laws 1973, ch. 59, § 1.

ANNOTATIONS

Law reviews. — For article, "Approaching Statutory Interpretation in New Mexico," see 8 Nat. Resources J. 689 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gambling §§ 226, 228.

Assignment of, or succession to, statutory right of action for recovery of money lost at gambling, 18 A.L.R.2d 999.

38 C.J.S. Gaming § 48.

44-5-4. Judgments, conveyances and contracts founded on gambling loss void; suit to declare void; parties.

All judgments, securities, bonds, bills, notes or conveyances, when the consideration is money or property won at gambling, or at any game or gambling device, shall be void, and may be set aside or vacated by any court of equity upon a bill filed for that purpose, by the person so granting, giving, entering into or executing the same or by any creditor or by his executors, administrators, or by any heir, purchaser or other persons interested therein; provided however, that the holder in due course of any such security, bond, bill or note which is otherwise negotiable holds such instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of such instrument for the full amount thereof against all parties liable thereon.

History: Laws 1856-1857, p. 36; C.L. 1865, ch. 36, § 4; C.L. 1884, § 2293; C.L. 1897, § 3202; Code 1915, § 2510; C.S. 1929, § 58-104; 1941 Comp., § 25-1004; 1953 Comp., § 22-10-4; Laws 1955, ch. 77, § 1.

ANNOTATIONS

Cross references. — As to transfer and negotiation generally, see 55-3-201 to 55-3-207 NMSA 1978.

As to holder in due course generally, see 55-3-301 to 55-3-310 NMSA 1978.

Emergency clauses. — Laws 1955, ch. 77, § 2, makes the act effective immediately. Approved March 4, 1955.

Party knowingly loaning money for gambling cannot recover by suit. — Where money is loaned or advanced with the understanding between the parties that it shall be

used in gambling, or where the party advancing the money shares in the gambling transaction, such party becomes particeps criminis and cannot recover in suit for the money loaned or advanced. Appleton v. Maxwell, 10 N.M. 748, 65 P. 158 (1901).

"Gambling" not restricted to games of chance. — The word "gambling" is not restricted to wagering upon the result of any game of chance, but applies to wagering of all kinds, and there can be no doubt that a horse race is a gambling device when adopted for such purpose. Joseph v. Miller, 1 N.M. 621 (1876).

Coin flip to decide between two alternatives not gambling. — Agreement between vendor and purchaser of a mortgaged farm whereby a coin flip was used to determine whether or not purchase price would be reduced, but where regardless of outcome, vendor would be relieved of obligation to pay penalty in the event that purchaser decided to pay off mortgage, was not void under the provisions of Sections 44-5-1 and 44-5-4 NMSA 1978 as being arrived at through gambling. This was no evil in the use of such coin flip for the purpose of determining which alternative should be applicable. (Because Sections 30-19-1 and 30-19-2 NMSA 1978 were not in effect at the time the agreement took place, the definitions of "bet" and "gambling device" as contained in those sections were not used in deciding this case.) Garvin v. Hudson, 76 N.M. 403, 415 P.2d 369 (1966).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gambling §§ 207 to 211.

Effect of Negotiable Instruments Act on statute invalidating instrument given for gambling consideration, 8 A.L.R. 314, 11 A.L.R. 211, 37 A.L.R. 698, 46 A.L.R. 959.

Right of maker, or other party to transfer, to make the defense that paper was transferred on a gambling consideration, 56 A.L.R. 1322.

38 C.J.S. Gaming §§ 26, 30 et seq.

44-5-5. [Defense in action by assignee.]

The assignment of any bond, bill, note, judgment, conveyance or other security, shall not affect the defense of the person executing the same.

History: Laws 1856-1857, p. 36; C.L. 1865, ch. 36, § 5; C.L. 1884, § 2294; C.L. 1897, § 3203; Code 1915, § 2511; C.S. 1929, § 58-105; 1941 Comp., § 25-1005; 1953 Comp., § 22-10-5.

ANNOTATIONS

Cross references. — As to the rights of a transferee of a negotiable instrument, see 55-3-203 NMSA 1978.

For the rights of a holder in due course, see 55-3-301 NMSA 1978 et seq.

For the rights of one not a holder in due course, see 55-3-306 NMSA 1978.

Party knowingly loaning money for gambling cannot recover by suit. — Appleton v. Maxwell, 10 N.M. 748, 65 P. 58 (1901).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gambling §§ 208 to 210.

44-5-6. [Loss by minor, servant or apprentice in grocery, store or dramshop; proprietor liable; who may sue.]

If any minor, servant or apprentice shall lose any money or property in any grocery, store or dramshop by betting at cards, or any other gambling device, or by any other bet, wager or hazard whatever, the father, mother, relations or guardian of such minor, or the master of such apprentice or servant may sue for and recover from the keeper of such grocery, store or dramshop, such money or property or the value thereof, so lost by such minor, apprentice or servant.

History: Laws 1856-1857, p. 36; C.L. 1865, ch. 36, § 6; C.L. 1884, § 2295; C.L. 1897, § 3204; Code 1915, § 2512; C.S. 1929, § 58-106; 1941 Comp., § 25-1006; 1953 Comp., § 22-10-6.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gambling § 234.

44-5-7. [How defenses under this article may be asserted.]

Any matter of defense, under this chapter [44-5-1 to 44-5-14 NMSA 1978], may be specially pleaded, or given in evidence, under the general issue.

History: Laws 1856-1857, p. 36; C.L. 1865, ch. 36, § 7; C.L. 1884, § 2296; C.L. 1897, § 3205; Code 1915, § 2513; C.S. 1929, § 58-107; 1941 Comp., § 25-1007; 1953 Comp., § 22-10-7.

ANNOTATIONS

Compiler's notes. — The term "this chapter" was substituted for the term "this act" by the 1915 Code compilers and refers to ch. 48 of the 1915 Code.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gambling §§ 257, 258.

38 C.J.S. Gaming § 63.

44-5-8. [Suit before magistrate; interrogatories to defendant.]

In all suits, under this chapter [44-5-1 to 44-5-14 NMSA 1978], before a justice of the peace [magistrate], the plaintiff may call in the defendant to answer, on oath, any interrogatory touching the case, and if the defendant refuse to answer, the same shall be taken as confessed.

History: Laws 1856-1857, p. 36; C.L. 1865, ch. 36, § 8; C.L. 1884, § 2297; C.L. 1897, § 3206; Code 1915, § 2514; C.S. 1929, § 58-108; 1941 Comp., § 25-1008; 1953 Comp., § 22-10-8.

ANNOTATIONS

Compiler's notes. — The term "this chapter" was substituted for the term "this act" by the 1915 Code compilers and refers to ch. 48 of the 1915 Code.

Laws 1968, ch. 62, § 40, abolishes the office of justice of the peace and provides that whenever the term "justice of the peace" occurs in the laws it shall be construed to refer to the magistrate court. See 35-1-38 NMSA 1978.

44-5-9. [Answer to interrogatories not evidence in criminal prosecution.]

Such answer shall not be admitted against such person as evidence in any criminal proceeding.

History: Laws 1856-1857, p. 36; C.L. 1865, ch. 36, § 9; C.L. 1884, § 2298; C.L. 1897, § 3207; Code 1915, § 2515; C.S. 1929, § 58-109; 1941 Comp., § 25-1009; 1953 Comp., § 22-10-9.

44-5-10. [Election bets included.]

Bets and wagers on an election authorized by the constitution and laws of the United States, or by the laws of this state, are gaming within the meaning of this chapter [44-5-1 to 44-5-14 NMSA 1978].

History: Laws 1856-1857, p. 36; C.L. 1865, ch. 36, § 10; C.L. 1884, § 2299; C.L. 1897, § 3208; Code 1915, § 2516; C.S. 1929, § 58-110; 1941 Comp., § 25-1010; 1953 Comp., § 22-10-10.

ANNOTATIONS

Compiler's notes. — The term "this chapter" was substituted for the term "this act" by the 1915 Code compilers and refers to ch. 48 of the 1915 Code.

Section applied to sheriff's election at general election. — This section applied to a bet or wager upon the result of the election of sheriff at a general election. Armstrong v. Aragon, 13 N.M. 19, 79 P. 291 (1905).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 C.J.S. Gaming § 89.

44-5-11. [Stakeholder's liability; demand required.]

Every stakeholder who shall knowingly receive any money or property, staked upon any betting, declared gaming by the provisions of this chapter [44-5-1 to 44-5-14 NMSA 1978], shall be liable to the party who placed such money or property in his hands, both before and after the determination of such bet, and the delivery of the money or property to the winner shall be no defense to an action brought by the loser for the recovery thereof: provided, that no stakeholder shall be liable afterwards, unless a demand has been made upon such stakeholder for the money or property in his possession previous to the expiration of the time agreed upon by the parties for the determination of such bet or wager.

History: Laws 1856-1857, p. 36; C.L. 1865, ch. 36, § 11; C.L. 1884, § 2300; C.L. 1897, § 3209; Code 1915, § 2517; C.S. 1929, § 58-111; 1941 Comp., § 25-1011; 1953 Comp., § 22-10-11.

ANNOTATIONS

Compiler's notes. — The term "this chapter" was substituted for the term "this act" by the 1915 Code compilers and refers to ch. 48 of the 1915 Code.

Public policy against gambling overrides rule preventing unjust enrichment. — The public policy of New Mexico is to restrain and discourage gambling and must override the rule which prevents unjust enrichment, particularly where there is a choice between that which is considered to be for the benefit of the public at large as distinguished from any benefit to an individual litigant. Schnoor v. Griffin, 79 N.M. 86, 439 P.2d 922 (1968).

Action cannot be maintained on contract that is illegal or against public policy, where both parties are equally culpable. Schnoor v. Griffin, 79 N.M. 86, 439 P.2d 922 (1968).

This section makes stakeholder liable for money placed in his hands "staked upon any betting." Where defendant was not a stakeholder - but a party to an illegal act - law will leave the parties where it found them. Schnoor v. Griffin, 79 N.M. 86, 439 P.2d 922 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gambling §§ 247, 248 to 250.

Recovery of money or property entrusted to another for illegal purpose, but not so used, 8 A.L.R.2d 307.

38 C.J.S. Gaming § 49.

44-5-12. [Garnishment against winner in action by creditor against loser.]

Any creditor to any person losing by any game at cards or any other gambling device, in addition to the remedy provided by the above sections of this chapter [44-5-1 to 44-5-14 NMSA 1978], shall have the right to garnishee the winner in any proceeding by attachment or execution, and the same proceeding shall be had thereon as if such winner were a debtor of the party losing to the amount of money, property, rights or credits, that may appear to have been so won by said winner from the party losing.

History: Laws 1856-1857, p. 36; C.L. 1865, ch. 36, § 12; C.L. 1884, § 2301; C.L. 1897, § 3210; Code 1915, § 2518; C.S. 1929, § 58-112; 1941 Comp., § 25-1012; 1953 Comp., § 22-10-12.

ANNOTATIONS

Cross references. — For procedures in garnishment proceedings, see 35-12-1 to 35-12-19 NMSA 1978.

Compiler's notes. — The term "this chapter" was substituted for the term "this act" by the 1915 Code compilers and refers to ch. 48 of the 1915 Code.

Law reviews. — For article, "Approaching Statutory Interpretation in New Mexico," see 8 Nat. Resources J. 689 (1968).

44-5-13. [Time for commencing action.]

Any action for money or property brought under this chapter [44-5-1 to 44-5-14 NMSA 1978], shall be commenced within one year from the time such action accrued, and not afterwards.

History: Laws 1856-1857, p. 38; C.L. 1865, ch. 36, § 13; C.L. 1884, § 2302; C.L. 1897, § 3211; Code 1915, § 2519; C.S. 1929, § 58-113; 1941 Comp., § 25-1013; 1953 Comp., § 22-10-13.

ANNOTATIONS

Compiler's notes. — The term "this chapter" was substituted for the term "this act" by the 1915 Code compilers and refers to ch. 48 of the 1915 Code.

Losses over one-year old cannot be set-off. — In a suit brought to recover money lost at gambling within one year prior to the bringing of such action, moneys won at gambling by the plaintiff from the defendant more than one year prior to the commencement of action by the plaintiff to recover his losses cannot be pleaded as a set-off or counterclaim to the original cause of action. Mann v. Gordon, 15 N.M. 652, 110 P. 1043 (1910).

Loss occurs at time game played, not when money paid. — Where, in action to recover money lost at gaming device, it was in evidence that the plaintiff did not settle the loss at the time of the play, but about six weeks later he gave a check which defendant cashed, the loss occurred at the time the game was played, and not when the check was given or the money paid. Mann v. Gordon, 15 N.M. 652, 110 P. 1043 (1910).

Objection to counterclaim barred by limitations sustained. — An objection to a counterclaim which pleaded a cause of action under the gaming statutes barred by the statutes of limitation was properly sustained. Mann v. Gordon, 15 N.M. 652, 110 P. 1043 (1910).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gambling §§ 238 to 243.

Action to recover money or property lost and paid through gambling as affected by statute of limitations, 22 A.L.R.2d 1390.

38 C.J.S. Gaming § 60.

44-5-14. Action for recovery; immunity.

All persons who shall claim money or property lost at gaming, or when said money or property may be claimed by his spouse, child, relation or friend, said person, although he may have gambled, is hereby exempted from the punishment imposed by the laws prohibiting and restraining gaming.

History: Laws 1856-1857, p. 38; C.L. 1865, ch. 36, § 14; C.L. 1884, § 2303; C.L. 1897, § 3212; Code 1915, § 2520; C.S. 1929, § 58-114; 1941 Comp., § 25-1014; 1953 Comp., § 22-10-14; Laws 1973, ch. 59, § 2.

ANNOTATIONS

Specific gambling penalty did not impliedly repeal this section. — Laws 1921, ch. 86 (since repealed) did not repeal by implication the exemption provision (this section) when it imposed a specific penalty for gambling. State v. Schwartz, 70 N.M. 436, 374 P.2d 418 (1962).

This statute (Sections 44-5-1 to 44-5-14 NMSA 1978) was designed to discourage gambling by depriving the person winning any of the things therein enumerated of any title thereto, and by providing the right to recover same. State v. Schwartz, 70 N.M. 436, 374 P.2d 418 (1962).

After gambling prosecution, person may not invoke these provisions. — The statute (Sections 44-5-1 to 44-5-14 NMSA 1978) imposes a duty upon one invoking it. It requires him to come forward, disclose and make known the criminal act by the filing of a civil action for recovery of his losses. He may not delay such disclosure until such time

as he is charged with the offense and then reap the benefits of the statute. State v. Schwartz, 70 N.M. 436, 374 P.2d 418 (1962).

Law reviews. — For article, "Approaching Statutory Interpretation in New Mexico," see 8 Nat. Resources J. 689 (1968).

ARTICLE 6
Declaratory Judgments

44-6-1. Short title.

This act [44-6-1 to 44-6-15 NMSA 1978] may be cited as the "Declaratory Judgment Act."

History: 1953 Comp., § 22-6-4, enacted by Laws 1975, ch. 340, § 1.

ANNOTATIONS

Cross references. — As to procedure with respect to declaratory judgment, see Rule 1-057 NMRA.

Law reviews. — For survey, "Civil Procedure in New Mexico in 1975," see 6 N.M. L. Rev. 367 (1976).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

44-6-2. Scope.

In cases of actual controversy, district courts within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect and shall have the force and effect of a final judgment or decree.

History: 1953 Comp., § 22-6-5, enacted by Laws 1975, ch. 340, § 2.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Administrative rule-making proceedings. — A court may not intervene in administrative rule-making proceedings before the adoption of a rule or regulation because the separation of powers doctrine forbids a court from prematurely interfering

with the administrative processes created by the legislature; only upon completion of administrative rule-making proceedings will a party be certain that it is aggrieved, since it is unknown whether a regulation will even be adopted by the agency; and since the administrative proceeding is not complete, there is no actual controversy to be resolved by a declaratory judgment action. New Energy Econ., Inc. v. Shoobridge, 2010-NMSC-049, 149 N.M. 42, 243 P.3d 746.

Where plaintiffs filed a complaint for a declaratory judgment to enjoin the environmental improvement board from holding fact-finding hearings on a proposal to regulate green house emissions on the grounds that the board lacked statutory authority to consider the proposal, the question of whether the board's rule-making actions exceeded its legislative authority was not ripe for judicial review because no final rule-making action had occurred and there was not an actual controversy. New Energy Econ., Inc. v. Shoobridge, 2010-NMSC-049, 149 N.M. 42, 243 P.3d 746.

Declaratory judgment action to determine authority to enact regulations. — A plaintiff may file an action under the Declaratory Judgment Act to raise a purely legal challenge to the environmental improvement board's authority under state law and may file the action independent of the administrative appeal process, with or without the environmental improvement board's consent. State ex rel. Hanosh v. State ex rel. King, 2009-NMSC-047, 147 N.M. 87, 217 P.3d 100, aff'g State ex rel. Hanosh v. N.M. Envtl. Improvement Bd., 2008-NMCA-156, 145 N.M. 270, 196 P.3d 970.

"Actual controversy" and "interested party" required. — Under this section's predecessor there must have been an "actual controversy" and an "interested party" petitioning for judgment. State ex rel. Maloney v. Sierra, 82 N.M. 125, 477 P.2d 301 (1970).

Controversy assuring concrete adverseness is key ingredient of standing. — The "gist of the question of standing" is whether the party seeking relief has alleged such personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. State ex rel. Overton v. N. M. State Tax Comm'n, 81 N.M. 28, 462 P.2d 613 (1969).

Decision to accept declaratory judgment jurisdiction discretionary and reviewable. — Whether a court assumes, takes, entertains, accepts or exercises jurisdiction in a declaratory judgment action, or refuses so to do, it is acting within its discretionary power which is subject to review for an alleged abuse thereof. Allstate Ins. Co. v. Firemen's Ins. Co., 76 N.M. 430, 415 P.2d 553 (1966).

Determination of remedy may be had before hearing on merits. — Contention that it was mandatory on the district court to hear a case on the merits before it could exercise its discretion to determine whether a declaratory judgment was the appropriate remedy and whether a declaration should be granted or denied was without merit. Allstate Ins. Co. v. Firemen's Ins. Co., 76 N.M. 430, 415 P.2d 553 (1966).

Action contesting proposed expenditure's constitutionality not premature. — Because the bond issue money has not been raised, nor spent, does not make this a premature suit for declaratory judgment, seeking a declaration that proposed expenditure of money was unconstitutional. Gomez v. Bd. of Educ., 83 N.M. 207, 490 P.2d 465 (1971).

Stipulation may supply absent allegations of answer. — Where an action for a declaratory judgment is submitted upon a stipulation that completely covers the case, then the matter of pleadings becomes immaterial and the fact that the pleadings contain no allegation upon a certain issue involved will not be considered. A stipulation may supply absent allegations of an answer. A stipulation may supply the failure to allege the amount involved, if such amount is contained in the stipulation itself. Lyle v. Luna, 65 N.M. 429, 338 P.2d 1060 (1959).

Question not pleaded but argued will be considered. — Where a controversial question was not pleaded but argued pro and con in briefs of the parties, the supreme court considers it in the same manner as a cause of action properly pleaded. Laughlin v. Laughlin, 49 N.M. 20, 155 P.2d 1010 (1944).

Dispute turning upon fact question still considered. — That the dispute turns upon question of fact does not withdraw it from judicial cognizance. National Liberty Ins. Co. of Am. v. Silva, 43 N.M. 283, 92 P.2d 161 (1939); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617, reh'g denied, 300 U.S. 687, 57 S. Ct. 461, 81 L. Ed. 617 (1937).

Judgment not disturbed where evidence conflicts and corroboration available. — Where land had been left out of a deed by mutual mistake, a finding to that effect and a determination of the value of the land would not be disturbed on appeal, where the evidence adduced in the declaratory judgment suit was conflicting and corroboration on the part of a disinterested witness was available. Collier v. Sage, 51 N.M. 147, 180 P.2d 242 (1947).

Trial court may properly grant declaratory and nondeclaratory relief in a single action when such relief is requested in the pleadings by the parties. Sunwest Bank v. Clovis IV, 106 N.M. 149, 740 P.2d 699 (1987).

II. ACTUAL CONTROVERSY.

In order to confer jurisdiction on court to enter declaration an actual controversy must exist. Allstate Ins. Co. v. Firemen's Ins. Co., 76 N.M. 430, 415 P.2d 553 (1966).

An actual controversy must exist to confer jurisdiction. Taos County Bd. of Educ. v. Sedillo, 44 N.M. 300, 101 P.2d 1027 (1940).

Question must be real and real interests on both sides. — The only controversy necessary to invoke action of the court and have it declare rights under declaratory

judgment provisions is that the question must be real, and not theoretical; the person raising it must have a real interest, and there must be someone having a real interest in the question who may oppose the declaration sought. Taos Cnty. Bd. of Educ. v. Sedillo, 44 N.M. 300, 101 P.2d 1027 (1940).

Remedy available if threat of unconstitutional deprivation of personal rights. — This remedy is only available under circumstances where one seeking relief is actually threatened with an unconstitutional deprivation of personal rights. Balizer v. Shaver, 82 N.M. 347, 481 P.2d 709 (Ct. App. 1971).

Prerequisites of "actual controversy" warranting consideration in declaratory judgment action are: a controversy involving rights or other legal relations of the parties seeking declaratory relief; a claim of right or other legal interest asserted against one who has an interest in contesting the claim; interests of the parties must be real and adverse; and the issue involved must be ripe for judicial determination. Sanchez v. City of Santa Fe, 82 N.M. 322, 481 P.2d 401 (1971).

Subject matter jurisdiction cannot be waived or conferred by consent. — There must be an "actual controversy" before jurisdiction is obtained. Jurisdiction of the subject matter cannot be conferred by consent of the parties, much less waived by them. Absent jurisdiction over the parties or absent the power or authority to decide the particular matter presented, and the lack of any essential element, is just as fatal to the judgment. If sensed by the court, even though not raised by the parties, the question of jurisdiction compels an answer. There must be a real and not a theoretical question, and the party raising it must have a real interest in the question before a declaratory judgment action will lie. State ex rel. Overton v. N.M. State Tax Comm'n, 81 N.M. 28, 462 P.2d 613 (1969).

Actual controversy when administrative stalemate detrimental to public interest exists. — Where there was an administrative stalemate detrimental to public interest, in which attorney general claimed that entire chapter on liquor sales was unconstitutional contrary to assertion of director of department of alcoholic beverage control, and attorney general construed a separate chapter on liquor sales to allow sale of alcoholic beverages by the drink on Sundays but director denied such an interpretation, there existed an actual controversy between interested parties rendering suit proper for declaratory judgment relief even though a licensed dispenser of alcoholic beverages was not a party. State ex rel. Maloney v. Sierra, 82 N.M. 125, 477 P.2d 301 (1970).

Deprivation of constitutional rights and prior arrests create actual controversy. — Where complaint alleged that by the use of the color of city vagrancy ordinance, the defendants had deprived and threatened to deprive the plaintiffs of the constitutional privileges and immunities granted to citizens of the United States, such language, coupled with the alleged facts relating to prior arrests of plaintiffs by defendants under vagrancy ordinance, adequately disclosed a fact situation from which it could properly be said that plaintiffs were actually threatened with deprivation of their personal constitutional rights, and consideration of the constitutionality of the ordinance under

this section's predecessor was warranted as against the contention that no actual controversy was present, even where both named plaintiffs were acquitted of the charges of vagrancy by the municipal court. Balizer v. Shaver, 82 N.M. 347, 481 P.2d 709 (Ct. App. 1971).

Actual controversy where municipality requires and subdivider refuses. — In case where municipality required subdivider to pay a $50.00 fee per lot to be used for subdivision maintenance and improvements, but the subdivider refused to do so, an actual controversy within the ambit of this section existed between the parties. Sanchez v. City of Santa Fe, 82 N.M. 322, 481 P.2d 401 (1971).

No actual controversy found in child custody case. — In an action brought pursuant to the federal Civil Rights Act (42 U.S.C. § 1983), because of a social worker's extraterritorial seizure of the plaintiff's child in California based on an ex parte order issued in New Mexico, the court did not err in denying declaratory relief, since full legal and physical custody of the child had been returned to the plaintiff. It is improper to grant declaratory relief in the absence of any actual case or controversy. Yount v. Millington, 117 N.M. 95, 869 P.2d 283 (Ct. App. 1993), cert. denied, 117 N.M. 121, 869 P.2d 820 (1994).

III. APPLICABILITY.

Venue for declaratory judgment action involving administrative appeals. — Where a statutory procedure existed for seeking judicial review of an administrative decision and the plaintiff initiated the administrative appeals process, the plaintiff could not circumvent the restrictions on where an administrative appeal could be filed by filing a declaratory judgment action. State ex rel. ENMU Regents v. Baca, 2008-NMSC-047, 144 N.M. 530, 189 P.3d 663.

Review of administrative actions. — A declaratory judgment action provides an alternative means of challenging an administrative entity’s authority to make a decision if the action involves purely legal issues that do not require fact finding by the administrative entity and if the action does not circumvent established time frames for seeking appellate review of an administrative action. Smith v. City of Santa Fe, 2007-NMSC-055, 142 N.M. 786, 171 P.3d 300.

Action lies to determine propriety of attorney general's action. — County board of education may properly file suit under this section's predecessor for a declaratory judgment as to the merits of refusal of attorney general to approve issuance of bonds for the purpose of erecting and furnishing school buildings in certain school districts. Taos Cnty. Bd. of Educ. v. Sedillo, 44 N.M. 300, 101 P.2d 1027 (1940).

To determine validity of state engineer regulations. — Where there was no statutory right to appeal or other avenue for review of the state engineer’s adoption of active water resource management regulations affecting water rights, the proper avenue to challenge the rule-making was through a declaratory judgment action. Tri-State

Generation and Transmission Ass'n,. Inc. v. D'Antonion,. 2011-NMC-014, 149 N.M. 386, 249 P.3d 924.

To determine validity of ordinance. — An action to determine the validity of a municipal ordinance prohibiting the keeping of livestock in certain areas was brought under these provisions. Mitchell v. City of Roswell, 45 N.M. 92, 111 P.2d 41 (1941).

To determine corporation's rights under unauthorized contract. — Action to determine rights of corporation under a contract made by its general manager without authority was brought under this section's predecessor. Burguete v. G.W. Bond & Bro. Mercantile Co., 43 N.M. 97, 85 P.2d 749 (1938).

To determine governmental agency's insurer's liability. — Where New Mexico department of highways was immune from suit when liability insurance did not cover auto collision for which recovery was sought, declaratory judgment against department's insurer as to coverage, absent which action against department was improper, was proper even though no judgment had been obtained against department. Baca v. N.M. State Hwy. Dep't, 82 N.M. 689, 486 P.2d 625 (Ct. App. 1971).

To determine whether insured destroyed own property. — Where liability of an insurer for destruction of property by fire depends upon the disputed fact of whether the insured burned his own property, a suit by the insurer under these provisions is authorized. Nat'l. Liberty Ins. Co. of Am. v. Silva, 43 N.M. 283, 92 P.2d 161 (1939).

To determine if wages paid according to bargaining agreement. — The president of a union has sufficient interest to bring suit for a declaratory judgment as to whether employer was required to pay employees, members of union, in accordance with scale set up in collective bargaining agreement. Key v. George E. Breece Lumber Co., 45 N.M. 397, 115 P.2d 622 (1941).

IV. RELATIONSHIP TO OTHER ACTIONS.

Main characteristic of declaratory judgment which distinguishes it from other judgments is the fact that it conclusively declares the preexisting rights of the litigants without the appendage of any coercive decree, and does not seek execution or performance from the defendant or opposing party, for no executory process follows as of course. Savage v. Howell, 45 N.M. 527, 118 P.2d 1113 (1940).

These provisions do not enlarge jurisdiction of courts over subject matter and parties, but provide an alternative means of presenting controversies to courts having jurisdiction thereof. Allstate Ins. Co. v. Firemen's Ins. Co., 76 N.M. 430, 415 P.2d 553 (1966).

Unless valid cause of action is stated under rules of substantive law, there can be no recourse to declaratory judgment procedure to reach the desired end. No new

substantive rights were created by the Declaratory Judgment Act. Am. Linen Supply of N.M., Inc. v. City of Las Cruces, 73 N.M. 30, 385 P.2d 359 (1963).

Declaratory actions are governed by same limitations applicable to other forms of relief, since the nature of the right sued upon, and not the form of action or relief demanded, determines the applicability of the statute of limitations. Taylor v. Lovelace Clinic, 78 N.M. 460, 432 P.2d 816 (1967).

No cause of action where complaint seeks to obtain evidence. — Where complaint seeks the aid of the court to obtain evidence which plaintiff considers necessary to establish an asserted claim or cause of action, and the costs thereof be charged to defendants if plaintiff's position is found to be correct, even though the defendant has agreed to the test if no obligation to pay therefor is placed upon it, trial court was correct in sustaining the motion to dismiss since the complaint stated no cause of action cognizable under this section's predecessor. Am. Linen Supply of N.M., Inc. v. City of Las Cruces, 73 N.M. 30, 385 P.2d 359 (1963).

Action not substitute for discovery procedures. — A declaratory judgment is not the proper means nor was it intended to provide a manner of developing proof otherwise not available. It is not a substitute for discovery procedures. It is designed for the determination of issues in recognized causes of action between parties in the light of evidence that each may present without any coercive decree being sought, at least in the first instance. Am. Linen Supply of N.M., Inc. v. City of Las Cruces, 73 N.M. 30, 385 P.2d 359 (1963).

Applicable prior determinations made by supreme court cannot be avoided by the expedient of seeking a declaratory judgment. Collier v. Sage, 51 N.M. 147, 180 P.2d 242 (1947).

Administrative remedies must be exhausted. — Where taxpayer does not make timely application for protest before state tax commission (now property tax division) prior to seeking a declaratory judgment in the courts, it is precluded from presenting the case to the courts for review. Associated Petroleum Transp., Ltd. v. Shepard, 53 N.M. 52, 201 P.2d 772 (1949).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Declaratory Judgments §§ 1, 33, 35 to 40, 238 to 242.

Declaration of rights or declaratory judgments, 12 A.L.R. 52, 19 A.L.R. 1124, 50 A.L.R. 42, 68 A.L.R. 110, 87 A.L.R. 1205, 114 A.L.R. 1361, 142 A.L.R. 8

Questions or controversy between public officers as within contemplation of Declaratory Judgment Act, 103 A.L.R. 1094.

Right to quiet title or remove cloud on title to personal property by suit in equity or under Declaratory Judgment Act, 105 A.L.R. 291.

Determination of constitutionality of statute or ordinance, or proposed statute or ordinance, as proper subject of judicial decision under Declaratory Judgment Act, 114 A.L.R. 1361.

Application of Declaratory Judgment Act to questions in respect of insurance policies, 123 A.L.R. 285, 142 A.L.R. 8

Action under Declaratory Judgment Act to test validity or effect of a decree of divorce, 124 A.L.R. 1336.

Questions regarding rights of inheritance or other rights in respect of another's estate after death as proper subject of declaratory action before latter's death, 139 A.L.R. 1239.

Application of Declaratory Judgment Act to questions in respect of insurance policies, 142 A.L.R. 8

Justiciable controversy within Declaratory Judgment Act as predicable upon advice, opinion or ruling of public administrative officer, 149 A.L.R. 349.

Statute of limitations or doctrine of laches in relation to declaratory actions, 151 A.L.R. 1076.

Validity and effect of former judgment or decree as proper subject for consideration in declaratory action, 154 A.L.R. 740.

May declaratory and coercive or executory relief be combined in action under Declaratory Judgment Act, 155 A.L.R. 501.

Release as proper subject of action for declaratory judgment, 167 A.L.R. 433.

Labor dispute as proper subject of declaratory action, 170 A.L.R. 421.

Custody of child as proper subject of declaratory action, 170 A.L.R. 521.

Right to declaratory relief as affected by existence of other remedy, 172 A.L.R. 847.

Determination of seniority rights of employee as proper subject of declaratory suit, 172 A.L.R. 1247.

Interest necessary to maintenance of declaratory determination of validity of statute or ordinance, 174 A.L.R. 549.

"Actual controversy" under declaratory judgment statute in building restriction cases, 174 A.L.R. 853.

Declaratory or advisory relief respecting future interest, 174 A.L.R. 880.

Declaratory judgments as to relief against covenant restricting right to engage in business or profession, 10 A.L.R.2d 743.

Extent to which res judicata principles apply to actions for declaratory relief, 10 A.L.R.2d 782.

Tax questions as proper subject of action for declaratory judgment, 11 A.L.R.2d 359.

Declaratory relief with respect to unemployment compensation, 14 A.L.R.2d 826.

Suspension or expulsion from social club or similar society and the remedies therefor, 20 A.L.R.2d 344.

Suspension or expulsion from church or religious society and the remedies therefor, 20 A.L.R.2d 421.

Suspension or expulsion from professional association and the remedies therefor, 20 A.L.R.2d 531.

Remedy for refusal of corporation or its agent to register or effectuate transfer of stock, 22 A.L.R.2d 12.

Burden of proof in actions under general declaratory judgment acts, 23 A.L.R.2d 1243.

Negligence issue as a proper subject for declaratory judgment, 28 A.L.R.2d 957.

Declaratory judgments as to partnership or joint-venture matters, 32 A.L.R.2d 970.

Validity of lease of real property, 60 A.L.R.2d 400.

Declaratory judgment, during lifetime of spouses, as to construction of antenuptial agreement dealing with property rights of survivor, 80 A.L.R.2d 941.

Declaratory judgment to determine validity or existence of common-law marriage, 92 A.L.R.2d 1102.

Availability and scope of declaratory judgment actions in determining rights of parties, or powers and exercise thereof by arbitrators, under arbitration agreements, 12 A.L.R.3d 854.

26 C.J.S. Declaratory Judgments §§ 1, 5, 24, 159.

Determination of price is actual controversy. — The state highway commission (now state transportation commission) can properly bring an action for declaratory judgment

to determine the amount to be paid for sand and gravel removed for public highway purposes. The determination of price is an actual controversy as contemplated by the declaratory judgment law, and declaratory judgment is a proper means of resolving the questions. 1961-62 Op. Att'y Gen. No. 61-12.

44-6-3. Definition.

As used in the Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978], "person" means any person, partnership, joint stock company, unincorporated association or society or municipal or other corporation of any character whatsoever.

History: 1953 Comp., § 22-6-6, enacted by Laws 1975, ch. 340, § 3.

44-6-4. Power to construe.

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

History: 1953 Comp., § 22-6-7, enacted by Laws 1975, ch. 340, § 4.

ANNOTATIONS

Challenges to administrative entity's authority to act. — A declaratory judgment action challenging an administrative entity's authority to act ordinarily should be limited to purely legal issues that do not require fact-finding by the administrative entity. Smith v. City of Santa Fe, 2007-NMCA-055, 142 N.M. 786, 171 P.3d 300.

Action alleging proposed expenditure unconstitutional not premature. — Because the bond issue money has not been raised, nor spent, does not make this a premature suit for declaratory judgment, seeking a declaration that proposed expenditure of money was unconstitutional. Gomez v. Bd. of Educ., 83 N.M. 207, 490 P.2d 465 (1971) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Declaratory Judgments §§ 68 to 86.

Determination of constitutionality of statute or ordinance, or proposed statute or ordinance, as proper subject of judicial decision under Declaratory Judgment Act, 114 A.L.R. 1361.

Application of Declaratory Judgment Act to questions in respect of contracts or alleged contracts, 162 A.L.R. 756.

Interest necessary to maintenance of declaratory determination of validity of statute or ordinance, 174 A.L.R. 549.

"Actual controversy" under declaratory judgment statute in zoning and building restriction cases, 174 A.L.R. 853.

Tax questions as proper subject of action for declaratory judgment, 11 A.L.R.2d 359.

Validity, construction and application of criminal statutes or ordinances as proper subject for declaratory judgment, 10 A.L.R.3d 727.

26 C.J.S. Declaratory Judgments §§ 44 to 52.

44-6-5. Contract construction.

A contract may be construed either before or after there has been a breach thereof.

History: 1953 Comp., § 22-6-8, enacted by Laws 1975, ch. 340, § 5.

ANNOTATIONS

Action alleging proposed bond issue expenditure unconstitutional not premature. Gomes v. Bd. of Educ., 83 N.M. 207, 490 P.2d 465 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Declaratory Judgments §§ 62 to 65.

26 C.J.S. Declaratory Judgments §§ 53 to 59.

44-6-6. Enumeration not exclusive.

The enumeration in Sections 4 [44-6-4 NMSA 1978] and 5 [44-6-5 NMSA 1978] of the Declaratory Judgment Act does not limit or restrict the exercise of the general powers conferred in Section 2 [44-6-2 NMSA 1978], in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

History: 1953 Comp., § 22-6-9, enacted by Laws 1975, ch. 340, § 6.

44-6-7. Discretionary.

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

History: 1953 Comp., § 22-6-10, enacted by Laws 1975, ch. 340, § 7.

ANNOTATIONS

Decision to accept declaratory judgment jurisdiction discretionary and reviewable. — Whether a court assumes, takes, entertains, accepts or exercises jurisdiction in a declaratory judgment action, or refuses so to do, it is acting within its discretionary power which is subject to review for an alleged abuse thereof. Allstate Ins. Co. v. Firemen's Ins. Co., 76 N.M. 430, 415 P.2d 553 (1966).

Discretion must be based on good reason. — The exercise of discretion to grant or refuse declaratory relief under this section must find its basis in good reason. Sunwest Bank v. Clovis IV, 106 N.M. 149, 740 P.2d 699 (1987).

Disputed interpretation of arbitration contract. — Where a complaint for declaratory judgment raises questions of law arising from the disputed interpretation of an arbitration contract, the proper forum for resolution of such questions is the trial court. Guar. Nat'l Ins. Co. v. Valdez, 107 N.M. 764, 764 P.2d 1322 (1988).

Discretion held not to have been abused. — The trial court is vested with broad discretion to grant or refuse claims for declaratory relief, and where a ruling that there existed full legal and public access to plaintiff's property would not have terminated the controversy giving rise to the action, the trial court did not abuse its discretion in refusing to rule on the matter. Colborne v. Vill. of Corrales, 106 N.M. 103, 739 P.2d 972 (1987).

Determination of remedy may be had before hearing on merits. — Contention that it was mandatory on the district court to hear a case on the merits before it could exercise its discretion to determine whether a declaratory judgment was the appropriate remedy and whether a declaration should be granted or denied was without merit. Allstate Ins. Co. v. Firemen's Ins. Co., 76 N.M. 430, 415 P.2d 553 (1966).

Law reviews. — For annual survey of New Mexico law of civil procedure, 19 N.M.L. Rev. 627 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Declaratory Judgments §§ 17 to 22.

26 C.J.S. Declaratory Judgments §§ 11, 12.

44-6-8. Review.

All orders, judgments and decrees under the Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978] may be reviewed as other order [orders], judgments and decrees.

History: 1953 Comp., § 22-6-11, enacted by Laws 1975, ch. 340, § 8.

ANNOTATIONS

Cross references. — As to appeals generally, see Rules 12-201 to 12-216 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 117.

26 C.J.S. Declaratory Judgments § 163.

44-6-9. Supplemental relief.

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

History: 1953 Comp., § 22-6-12, enacted by Laws 1975, ch. 340, § 9.

ANNOTATIONS

Supplemental relief available on showing of need to complete relief. — Supplemental relief to a declaratory judgment whenever necessary or proper may only be entered after an order to show cause, and then upon a determination that it should be granted to complete the relief declared. State ex rel. Bingaman v. Valley Sav. & Loan Ass'n, 97 N.M. 8, 636 P.2d 279 (1981).

Declaratory and nondeclaratory relief in single action. — The trial court may properly grant declaratory and nondeclaratory relief in a single action when such relief is requested in the pleadings by the parties. State ex rel. Bardacke v. N.M. Fed. Sav. & Loan Ass'n, 102 N.M. 673, 699 P.2d 604 (1985).

Pending appeal, a trial court retains jurisdiction to enforce an unsuperseded judgment. United Nuclear Corp. v. Gen. Atomic Co., 98 N.M. 633, 651 P.2d 1277 (1982), cert. denied, 460 U.S. 1017, 103 S. Ct. 1262, 75 L. Ed. 2d 488 (1983).

Court may provide for future proceedings to enforce right declared. — In action under this section's predecessor, the court found that the debt due by plaintiffs to defendant had not been canceled, found the amounts thereof and the nature of the security and provision was made for future proceedings to enforce the rights declared by appropriate remedy. Burguete v. G.W. Bond & Bro. Mercantile Co., 43 N.M. 97, 85 P.2d 749 (1938) (decision under former, similar provision).

Declaratory judgment declares preexisting rights without coercive decree. — The principal characteristic of the declaratory judgment which distinguishes it from other judgments is that it declares preexisting rights of the parties without a coercive decree. Execution or performance by the opposing parties does not follow as a matter of course.

Pan Am. Petroleum Corp. v. El Paso Natural Gas Co., 77 N.M. 481, 424 P.2d 397 (1966).

When necessary or proper coercive decree could be entered. — This section's predecessor did authorize the court, when necessary or proper, to grant complete relief and to enter a coercive decree to carry the declaratory judgment into effect. Pan Am. Petroleum Corp. v. El Paso Natural Gas Co., 77 N.M. 481, 424 P.2d 397 (1966).

Coercive decree granted on showing of need to complete relief. — A coercive decree may only be entered after an order to show cause, and then upon a determination that it should be granted to complete the relief declared. Pan Am. Petroleum Corp. v. El Paso Natural Gas Co., 77 N.M. 481, 424 P.2d 397 (1966).

When a request for damages is part of a declaratory action, like suits for coercive relief, the judgment is not final, and hence appealable, until the damage award is quantified. Principal Mut. Life Ins. Co. v. Straus, 116 N.M. 412, 863 P.2d 447 (1993).

Power to issue writ of mandamus. — Because the retiree sought a declaratory judgment to establish his entitlement to begin receiving his retirement annuity, and because the retiree was able to satisfy the district court that the facts supported his position and that the board was required to perform by direction of law regardless of its own opinion as to the propriety or impropriety of doing so, mandamus was entirely appropriate. Rainaldi v. Pub. Employees Ret. Bd., 115 N.M. 650, 857 P.2d 761 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Declaratory Judgments § 243.

Decree or order which merely declares rights of parties without an express command or prohibition as basis of contempt proceeding, 29 A.L.R. 134.

Remedy or procedure to make effective rights established by declaratory judgment, 101 A.L.R. 689.

May declaratory and coercive or executory relief be combined in action under Declaratory Judgment Act, 155 A.L.R. 501.

26 C.J.S. Declaratory Judgments § 162.

44-6-10. Jury trial.

When a proceeding under the Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978] involves the determination of an issue of fact, the issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

History: 1953 Comp., § 22-6-13, enacted by Laws 1975, ch. 340, § 10.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Declaratory Judgments §§ 228, 230.

Jury trial in action for declaratory relief, 131 A.L.R. 218, 13 A.L.R.2d 777.

Right to jury trial in action for declaratory relief in state court, 33 A.L.R.4th 146.

26 C.J.S. Declaratory Judgments §§ 155, 156.

44-6-11. Costs.

In any proceeding under the Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978], the court may make an award of costs as may seem equitable and just.

History: 1953 Comp., § 22-6-14, enacted by Laws 1975, ch. 340, § 11.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Declaratory Judgments § 253.

44-6-12. Parties.

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, the municipality shall be made a party and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.

History: 1953 Comp., § 22-6-15, enacted by Laws 1975, ch. 340, § 12.

ANNOTATIONS

Necessary parties. — Injured third-party claimant may participate in a declaratory judgment action brought by an automobile insurance company against its insured seeking to deny coverage under its policy. Third-party claimants are necessary parties to such declaratory judgment actions. Gallegos v. Nevada Gen. Ins.Co., 2011-NMCA-004, 149 N.M. 364, 248 P.3d 912.

Attorney general to be served where constitutionality of statute questioned. — This section requires service upon the attorney general not only when it is alleged that a statute, on its face, is unconstitutional but also where the statute is alleged to be

unconstitutional in its application to a particular person. Lazo v. Bd. of Cnty. Comm'rs, 102 N.M. 35, 690 P.2d 1029 (1984).

Taxpayers. — Rule 1-019 NMRA does not require joinder of every person who might have standing to challenge an action, and neither does this section; requiring the joinder of every citizen or taxpayer in the suit would defeat the purpose of the Declaratory Judgment Act. San Juan Water Comm'n v. Taxpayers & Water Users, 116 N.M. 106, 860 P.2d 748 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Declaratory Judgments §§ 203, 204, 209 to 211.

Joinder of causes of action and parties in suit under Declaratory Judgment Act, 110 A.L.R. 817.

Construction, application and effect of § 11 of the Uniform Declaratory Judgments Act that all persons who have or claim any interest which would be affected by the declaration shall be made parties, 71 A.L.R.2d 723.

26 C.J.S. Declaratory Judgments §§ 121, 130, 131, 132.

44-6-13. State or official may be sued; construction of constitution or statute.

For the purpose of the Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978], the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the constitution of the state of New Mexico, the constitution of the United States or any of the laws of the state of New Mexico or the United States, or any statute thereof.

History: 1953 Comp., § 22-6-16, enacted by Laws 1975, ch. 340, § 13.

ANNOTATIONS

Cross references. — For declaratory judgment proceedings where state a party, see Rule 1-057B NMRA.

Action against the state was not barred by the eleventh amendment sovereign immunity. — Where the public education department reduced the amount of state revenues paid each month to the school district as an offset for funds received by the school district under the federal impact aid statute, 20 U.S.C. § 7709; the federal statute permitted the state to offset federal revenue as long as the state had been granted certification to do so by the federal department of education; the public education department implemented the offset before it had received federal certification; and the school district sued for reimbursement of state funds that had been offset before federal

certification had been issued, the action did not violate sovereign immunity under the eleventh amendment because the basis of the action was to compel the public education department to give the school district its full share of state funds in accordance with Section 22-8-25 NMSA 1978 without reduction for federal aid. Zuni Pub. School Dist. #89 v. N.M. Pub. Educ. Dep't, 2012-NMCA-048, 277 P.3d 1252, cert. denied, 2012-NMCERT-004.

Action against the state for money damages was not barred by sovereign immunity under New Mexico law. — Where the public education department reduced the amount of state revenues paid each month to the school district as an offset for funds received by the school district under the federal impact aid statute, 20 U.S.C. § 7709; the federal statute permitted the state to offset federal revenue as long as the state had been granted certification to do so by the federal department of education; and the public education department implemented the offset before it had received federal certification, the school district's action against the public education department for monetary damages in the amount of state revenues that had been deducted before federal certification had been issued was not barred by sovereign immunity under New Mexico law. Zuni Pub. School Dist. #89 v. N.M. Pub. Educ. Dep't, 2012-NMCA-048, 277 P.3d 1252, cert. denied, 2012-NMCERT-004.

This section's predecessor was not a general consent by state to be sued. Taos County Bd. of Educ. v. Sedillo, 44 N.M. 300, 101 P.2d 1027 (1940).

State's consent to sue must otherwise exist. — It could be argued that this section's predecessor was a general consent on the part of the state to be sued under its provisions. However, it has no such meaning and has no greater effect, insofar as this consideration is concerned, than merely to permit parties to sue the state under the act where the state's consent to be sued otherwise exists and the facts warrant suit. In re Will of Bogert, 64 N.M. 438, 329 P.2d 1023 (1958).

Employee's action against a State retirement board under the Age Discrimination in Employment Act, 29 U.S.C.S. § 621 et seq., was barred by the doctrine of sovereign immunity because the ADEA's abrogation of sovereign immunity was not a valid exercise of Congressional power under the Fourteenth Amendment; moreover, the New Mexico Declaratory Judgment Act, 44-6-1 to 44-6-15 NMSA 1978, did not operate to waive immunity. Gill v. Pub. Employees Ret. Bd., 2003-NMCA-038, 133 N.M. 345, 62 P.3d 1227, rev'd, 2004- NMSC-016, 135 N.M. 472, 90 P.3d 491.

The Declaratory Judgment Act does not have the effect of general consent to be sued; it merely permits parties to sue the state when the state's consent to be sued otherwise exists. Gill v. Public Employees Ret. Bd., 2004-NMSC-016, 135 N.M. 472, 90 P.3d 491, rev'g 2003-NMCA-038, 133 N.M. 345, 62 P.3d 1227.

And the facts must justify the suit. — Under this section's predecessor parties could sue the state only in those situations where the state's consent to be sued otherwise already existed and the facts justified the suit, and it did not provide for a general

consent to be sued under the Declaratory Judgment Act. Arnold v. State, 48 N.M. 596, 154 P.2d 257 (1944).

Statutes which authorize suits against state must be construed strictly and where a suit to declare a statute unconstitutional is brought against the state it must be dismissed in the absence of express statutory authority for bringing it. Arnold v. State, 48 N.M. 596, 154 P.2d 257 (1944).

Where mandamus and prohibition lie declaratory judgment also issues. — Where other remedies such as mandamus or prohibition will lie against a state agency, declaratory judgment should also issue and would not be an enlargement of actions against the state. Harriett v. Lusk, 63 N.M. 383, 320 P.2d 738 (1958).

Actual controversy when administrative stalemate detrimental to public interest exists. State ex rel. Maloney v. Sierra, 82 N.M. 125, 477 P.2d 301 (1970).

Injured party has standing to sue under Declaratory Judgment Act on any genuine question involving the constitutionality or construction of a statute. Harriett v. Lusk, 63 N.M. 383, 320 P.2d 738 (1958).

Administrative remedies must be exhausted before action lies. — Where taxpayer does not make timely application for protest before state tax commission (now property tax division) prior to seeking a declaratory judgment in the courts, it is precluded from presenting the case to the courts for review. Associated Petroleum Transp., Ltd. v. Shepard, 53 N.M. 52, 201 P.2d 772 (1949).

Opinion not precedent on justiciable controversy issue if not presented. — When the jurisdiction of the court to render a declaratory judgment has not been questioned for want of a justiciable controversy, but might have been, the opinion of the supreme court is not stare decisis on the question whether such controversy is presented. Taos Cnty. Bd. of Educ. v. Sedillo, 44 N.M. 300, 101 P.2d 1027 (1940).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Declaratory Judgments §§ 68 to 70, 209, 210.

Federal question jurisdiction in declaratory judgment suit challenging state statute or regulation on grounds of federal preemption, 69 A.L.R. Fed. 753.

26 C.J.S. Declaratory Judgments §§ 44 to 47, 130.

44-6-14. Construction.

The Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978] is declared to be remedial. The act's purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered.

History: 1953 Comp., § 22-6-17, enacted by Laws 1975, ch. 340, § 14.

ANNOTATIONS

Actions not intended as substitute for mandamus. — Declaratory judgment actions are not intended to provide a substitute for other available actions, such as mandamus. A mandamus will not be denied on the ground that the plaintiff did not bring a declaratory judgment action. City of Albuquerque v. Ryon, 106 N.M. 600, 747 P.2d 246 (1987).

Law reviews. — For survey, "Civil Procedure in New Mexico in 1975," see 6 N.M. L. Rev. 367 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Declaratory Judgments §§ 7 to 10.

26 C.J.S. Declaratory Judgments §§ 3, 7, 8, 9.

44-6-15. Uniformity of interpretation.

The Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978] shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

History: 1953 Comp., § 22-6-18, enacted by Laws 1975, ch. 340, § 15.

ANNOTATIONS

Severability. — Laws 1975, ch. 340, § 17, provides for the severability of the Declaratory Judgment Act, except for sections 2 and 4 (44-6-2 and 44-6-4 NMSA 1978), if any part or application thereof is held invalid.

Law reviews. — For survey, "Civil Procedure in New Mexico in 1975," see 6 N.M. L. Rev. 367 (1976).

ARTICLE 7
Arbitration

(Repealed by Laws 2001, ch. 227, § 33.)

44-7-1 to 44-7-22. Repealed.

ANNOTATIONS

Repeals. — Laws 2001, ch. 227, § 33 repeals 44-7-1 through 44-7-22 NMSA 1978, as enacted by Laws 1971, ch. 168, §§ 1 to 23, the former Uniform Arbitration Act, effective July 1, 2001. For provisions of former sections, see 2000 Replacement Pamphlet. For present comparable provisions, see 44-7A-1 NMSA 1978 et seq.

ARTICLE 7A
Uniform Arbitration

44-7A-1. Short title; definitions.

(a) The provisions of this act may be cited as the "Uniform Arbitration Act" [44-7A-1 NMSA 1978].

(b) As used in the Uniform Arbitration Act:

(1) "arbitration organization" means an association, agency, board, commission or other entity that is neutral and initiates, sponsors or administers an arbitration proceeding or is involved in the appointment of an arbitrator;

(2) "arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate;

(3) "court" means a court of competent jurisdiction in this state;

(4) "disabling civil dispute clause" means a provision modifying or limiting procedural rights necessary or useful to a consumer, borrower, tenant or employee in the enforcement of substantive rights against a party drafting a standard form contract or lease, such as, by way of example, a clause requiring the consumer, tenant or employee to:

(a) assert a claim against the party who prepared the form in a forum that is less convenient, more costly or more dilatory than a judicial forum established in this state for resolution of the dispute;

(b) assume a risk of liability for the legal fees of the party preparing the contract, but a seller, lessor or lender may exact for a buyer, tenant or borrower an obligation to reimburse the seller, lessor or lender for a reasonable fee paid to secure enforcement of a promise to pay money;

(c) forego access to the discovery of evidence as provided in the rules of procedure of a convenient judicial forum available to hear and decide a dispute between the parties;

(d) present evidence to a purported neutral person who may reasonably be expected to regard the party preparing the contract as more likely to be a future employer of the neutral person;

(e) forego recourse to appeal from a decision not based on substantial evidence or disregarding the legal rights of the consumer, tenant or employee;

(f) decline to participate in a class action; or

(g) forego an award of attorney fees, civil penalties or multiple damages otherwise available in a judicial proceeding;

(5) "knowledge" means actual knowledge;

(6) "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, governmental agency, governmental instrumentality, public corporation or any other legal or commercial entity;

(7) "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and

(8) "standard form contract or lease" means a written instrument prepared by a party for whom its use is routine in business transactions with consumers of goods or services, borrowers, tenants or employees.

History: Laws 2001, ch. 227, § 1.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Malicious abuse of process. — For purposes of the tort of malicious abuse of process, arbitration proceedings are judicial proceedings, and the improper use of process in an arbitration proceeding to accomplish an illegitimate end may form the basis of a malicious abuse of process claim. Durham v. Guest, 2009-NMSC-007, 145 N.M. 694, 204 P.3d 19, reversing, 2007-NMCA-144, 142 N.M. 817, 171 P.3d 756.

Malicious abuse of process in arbitration proceedings. — The plaintiffs' allegation that the defendant issued a subpoena during an arbitration proceeding for the purpose of extortion is sufficient to state a malicious abuse of process claim when the defendant did not initiate the arbitration proceeding against the plaintiffs. Durham v. Guest, 2009-NMSC-007, 145 N.M. 694, 204 P.3d 19, rev'g 2007-NMCA-144, 142 N.M. 817, 171

P.3d 756 and overruling in part, DeVaney v. Thriftway Marketing Corp., 1998-NMSC-001, 124 N.M. 512, 953 P.2d 277.

Cases under prior law. — The pre-2001 cases below were decided under the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978. Because of the similarities between the two laws, the case annotations have been retained and included as annotations to the 2001 Uniform Arbitration Act.

Legislative intent in enacting Uniform Arbitration Act and the policy of the courts in enforcing it is to reduce caseloads in the courts, not only by allowing arbitration, but also by requiring controversies to be resolved by arbitration where contracts or other documents so provide. Dairyland Ins. Co. v. Rose, 92 N.M. 527, 591 P.2d 281 (1979); Daniels Ins. Agency, Inc. v. Jordan, 99 N.M. 297, 657 P.2d 624 (1982).

Uniform Arbitration Act supersedes conflicting common-law authority. Andrews v. Stearns-Roger, Inc., 93 N.M. 527, 602 P.2d 624 (1979).

In New Mexico, arbitration proceedings and awards are governed both by common law and by the Uniform Arbitration Act, but provisions of the act govern where the act conflicts with the common law. Daniels Ins. Agency, Inc. v. Jordan, 99 N.M. 297, 657 P.2d 624 (1982).

Announced policy of New Mexico favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties, and to this end the legislature has assigned the courts a minimal role in supervising arbitration practice and procedures. K.L. House Constr. Co. v. City of Albuquerque, 91 N.M. 492, 576 P.2d 752 (1978); Bernalillo Cnty. Med. Ctr. Employees' Ass'n Local 2370 v. Cancelosi, 92 N.M. 307, 587 P.2d 960 (1978).

Unlicensed business cannot compel arbitration. — Texas corporations unauthorized to do business in New Mexico were unable to compel two dentists to arbitrate a dispute arising from an alleged breach of architectural and construction contracts for the construction of dental offices because a suit to compel arbitration is essentially a suit for specific performance and the corporations, not licensed to do business in New Mexico, cannot perform. Shaw v. Kuhnel & Assocs., Inc., 102 N.M. 607, 698 P.2d 880 (1985).

Third-party beneficiary of arbitration agreement. — Where plaintiff entered into a title loan agreement with defendant; a condition of the loan required plaintiff to maintain insurance for the full value of the vehicle; plaintiff purchased the required insurance; the vehicle was subsequently involved in an accident that rendered the vehicle inoperable; and the loan agreement contained an arbitration provision which provided that plaintiff agreed to submit to arbitration all claims or disputes against all persons who may be liable to either plaintiff or the lender, the insurance company was a third-party beneficiary under the arbitration and could compel arbitration of plaintiff’s claim against the insurance company. Rivera v. Am. Gen. Fin. Servs., Inc., 2010-NMCA-046, 148 N.M. 784, 242 P.3d 351, rev'd, 2011-NMSC-033, 150 N.M. 398, 259 P.3d 803.

Arbitration agreement to be interpreted by rules of contract law. — The terms of the arbitration agreement are to be interpreted by the rules of contract law. Christmas v. Cimarron Realty Co., 98 N.M. 330, 648 P.2d 788 (1982).

Both statutory and common-law arbitration exist without conflict. — Since nothing is said in these provisions that common-law arbitrations are abolished, both methods of arbitration may exist, one under the statute and the other under the common law without conflicting with each other. Robinson v. Navajo Freight Lines, 70 N.M. 215, 372 P.2d 801 (1962) (decision under former law).

Agreement defines scope of jurisdiction of arbitration. — Parties contracting to resolve disputes by arbitration are bound by their agreement. The terms of the agreement define the scope of the jurisdiction, conditions, limitations and restrictions on the matters to be arbitrated. Christmas v. Cimarron Realty Co., 98 N.M. 330, 648 P.2d 788 (1982).

Arbitration agreement will be given broad interpretation. — When the parties agree to arbitrate any potential claims or disputes arising out of their relationships by contract or otherwise, the arbitration agreement will be given broad interpretation, unless the parties themselves limit arbitration to specific areas or matters. Barring such limiting language, the courts only decide the threshold question of whether there is an agreement to arbitrate. K.L. House Constr. Co. v. City of Albuquerque, 91 N.M. 492, 576 P.2d 752 (1978).

Forum for resolution of disputed interpretation. — Where a complaint for declaratory judgment raises questions of law arising from the disputed interpretation of an arbitration contract, the proper forum for resolution of such questions is the trial court. Guar. Nat'l Ins. Co. v. Valdez, 107 N.M. 764, 764 P.2d 1322 (1988).

Decision of joint committee subject to same standards as arbitrator's award. — Where the parties voluntarily submit a grievance to a joint management union committee for decision, the decision of that committee is subject to and governed by the same standards as an arbitrator's award, and is to be accorded the same finality. Andrews v. Stearns-Roger, Inc., 93 N.M. 527, 602 P.2d 624 (1979).

When trial court determines force of disputed contract. — When a petition is filed to compel arbitration pursuant to a contract's arbitration clause and the responding party denies the existence or validity of the contract, the trial court must determine whether the contract is still in force to compel the requested arbitration. Gonzales v. United S.W. Nat'l Bank, 93 N.M. 522, 602 P.2d 619 (1979).

Determination of fraud in the inducement. — When a party challenges only an arbitration provision as fraudulently induced, the district court must decide this issue before sending the entire contract containing the arbitration provision to the arbitrator. Murken v. Deutsche Morgan Grenfell, Inc., 2006-NMCA-080, 140 N.M. 68, 139 P.3d 864.

Law reviews. — For note, "Uninsured Motorist Arbitration," see 3 N.M. L. Rev. 220 (1973).

For article, "The Contract to Arbitrate Future Disputes: A Comparison of the New Mexico Act with the New York and Federal Acts," see 9 N.M.L. Rev. 71 (1978-79).

For article, "Arbitration of Domestic Relations Disputes in New Mexico," see 16 N.M.L. Rev. 321 (1986).

For survey of construction law in New Mexico, see 18 N.M.L. Rev. 331 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution §§ 8 et seq., 70 et seq.

Matters arbitrable under arbitration provisions of collective labor contract, 24 A.L.R.2d 752.

Construction and effect of severance or dismissal pay provisions of employment contract or collective labor agreement, 40 A.L.R.2d 1044.

Contract providing that it is governed by or subject to rules or regulations of a particular trade, business or association as incorporating agreement to arbitrate, 41 A.L.R.2d 872.

Constitutionality of compulsory arbitration statutes, 55 A.L.R.2d 432.

Arbitration of disputes within close corporation, 64 A.L.R.2d 643.

Power of president of corporation to commence or to carry on arbitration proceedings, 65 A.L.R.2d 1321.

Dissolved corporation's power to participate in arbitration proceedings, 71 A.L.R.2d 1121.

Agreement to arbitrate future controversies as binding on infants, 78 A.L.R.2d 1292.

Covenant in lease to arbitrate, or to submit to appraisal, as running with the leasehold so as to bind assignee, 81 A.L.R.2d 804.

Availability and scope of declaratory judgment actions in determining rights of parties, or powers and exercise thereof by arbitrators, under arbitration agreements, 12 A.L.R.3d 854.

Validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction, 12 A.L.R.3d 892.

Validity and construction of provision for arbitration of disputes as to alimony or support payments, or child visitation or custody matters, 38 A.L.R.5th 69.

Municipal corporation's power to submit to arbitration, 20 A.L.R.3d 569.

Validity and enforceability of provision for binding arbitration, and waiver thereof, 24 A.L.R.3d 1325.

Delay in asserting contractual right to arbitration as precluding enforcement thereof, 25 A.L.R.3d 1171.

Breach or repudiation of collective labor contract as subject to, or as affecting right to enforce, arbitration provision in contract, 29 A.L.R.3d 688.

Breach or repudiation of contract as affecting right to enforce arbitration clause therein, 32 A.L.R.3d 377.

Participation in arbitration proceedings as waiver of objections to arbitrability, 33 A.L.R.3d 1242.

Statute of limitations as bar to arbitration under agreement, 94 A.L.R.3d 533.

Conflict of laws as to validity and effect of arbitration provision in contract for purchase or sale of goods, products, or services, 95 A.L.R.3d 1145.

Defendant's participation in action as waiver of right to arbitration of dispute involved therein, 98 A.L.R.3d 767.

Claim of fraud in inducement of contract as subject to compulsory arbitration clause contained in contract, 11 A.L.R.4th 774.

Liability of organization sponsoring or administering arbitration to parties involved in proceeding, 41 A.L.R.4th 1013.

Attorney's submission of dispute to arbitration, or amendment of arbitration agreement, without client's knowledge or consent, 48 A.L.R.4th 127.

Validity and construction of agreement between attorney and client to arbitrate disputes arising between them, 26 A.L.R.5th 107.

Alternative dispute resolution: sanctions for failure to participate in good faith in, or comply with agreement made in, mediation, 43 A.L.R.5th 545.

Participation in arbitration proceedings as waiver to objections to arbitrability under state law, 56 A.L.R.5th 757.

Consolidation by federal court of arbitration proceedings brought under Federal Arbitration Act (9 USCS § 4), 104 A.L.R. Fed. 251.

Enforceability of arbitration clauses in collective bargaining agreements as regards claims under federal civil rights statutes, 152 A.L.R. Fed. 75.

6 C.J.S. Arbitration § 1 et seq.

44-7A-2. Notice.

(a) Except as otherwise provided in the Uniform Arbitration Act [44-7A-1 NMSA 1978], a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.

(b) A person has notice if the person has knowledge of the notice or has received notice.

(c) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business, or at another location held out by the person as a place of delivery of such communications.

History: Laws 2001, ch. 227, § 2.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Effect of failure of proper notice. — Because the appellant was prejudiced by the arbitrator's failure to give him proper notice of the third hearing, and because the failure to give notice was sufficient cause to require the arbitrator to postpone the hearing, the trial court erred when it failed to vacate the arbitration award pursuant to Section 44-7-12A(4) NMSA 1978 (now Section 44-7A-24 NMSA 1978). Jaycox v. Ekeson, 115 N.M. 635, 857 P.2d 35 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution § 183.

Necessity and sufficiency of notice of and hearing in proceedings before appraisers and arbitrators appointed to determine amount of insurance loss, 25 A.L.R.3d 680.

6 C.J.S. Arbitration § 83.

44-7A-3. When the uniform arbitration applies.

(a) The Uniform Arbitration Act [44-7A-1 NMSA 1978] governs an agreement to arbitrate made on or after the effective date of that act.

(b) The Uniform Arbitration Act governs an agreement to arbitrate made before the effective date of that act if all the parties to the agreement or to the arbitration proceeding so agree in a record.

History: Laws 2001, ch. 227, § 3.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

44-7A-4. Effect of agreement to arbitrate; nonwaivable provisions.

(a) Except as otherwise provided in Subsections (b) and (c), a party to an agreement to arbitrate or to an arbitration proceeding may waive or the parties may vary the effect of the requirements of the Uniform Arbitration Act [44-7A-1 NMSA 1978] to the extent permitted by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) waive or agree to vary the effect of the requirements of Section 6(a), 7(a), 9, 18(a), 18(b), 27 or 29 [44-7A-6, 44-7A-7, 44-7A-9, 44-7A-18, 44-7A-27 or 44-7A-29 NMSA 1978];

(2) agree to unreasonably restrict the right under Section 10 [44-7A-10 NMSA 1978] to notice of the initiation of an arbitration proceeding;

(3) agree to unreasonably restrict the right under Section 12 [44-7A-12 NMSA 1978] to disclosure of any facts by a neutral arbitrator; or

(4) waive the right under Section 17 [44-7A-17 NMSA 1978] of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under the Uniform Arbitration Act, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(c) A party to an agreement to arbitrate or arbitration proceeding may not waive or the parties may not vary the effect of the requirements of this section or Section 3(a), 8, 15, 19, 21(d) or (e), 23, 24, 25, 26(a) or (b), 30, 31, 32 or 33 [44-7A-3, 44-7A-15, 44-7A-

19, 44-7A-21, 44-7A-23, 44-7A-24, 44-7A-25, 44-7A-26, 44-7A-30, 44-7A-31, 44-7A-32, or 44-7A-33 NMSA 1978].

History: Laws 2001, ch. 227, § 4.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Waiver by invoking judicial discretion. — Where the union filed an action in district court to enjoin the municipality from closing a drug treatment program and laying off bargaining unit employees on the grounds that the municipality failed to follow the procedures for layoffs contained in the collective bargaining agreement; at the hearing in district court, the union pursued the issue of layoffs within its request for injunctive relief and through the testimony of its witnesses and the district court dealt with the merits of whether the municipality violated the layoff procedures; when the district court refused to enjoin the municipality from laying off bargaining unit members, the union filed a motion to compel arbitration on the issue of layoffs; the union did not assert its right to arbitration during the three months of litigation and for two months thereafter; and the union told the district court that arbitration was not an adequate remedy, because the union invoked the discretion of the district court and the judicial machinery by raising the issue of whether the municipality followed the collective bargaining agreement as to layoffs and caused the municipality to rely on and be prejudiced by the union's decision to litigate the layoffs, the union waived its right to arbitrate the issue of layoffs. AFSCME v. City of Albuquerque, 2013-NMCA-049, 299 P.3d 441, cert. granted, 2013-NMCERT-004.

Agreement defines scope of jurisdiction of arbitration. — Parties contracting to resolve disputes by arbitration are bound by their agreement. The terms of the agreement define the scope of the jurisdiction, conditions, limitations and restrictions on the matters to be arbitrated. Christmas v. Cimarron Realty Co., 98 N.M. 330, 648 P.2d 788 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Enforcement of arbitration agreement contained in construction contract by or against nonsignatory, 100 A.L.R.5th 481.

44-7A-5. Disabling civil dispute clause voidable.

In the arbitration of a dispute between a consumer, borrower, tenant or employee and another party, a disabling civil dispute clause contained in a document relevant to the dispute is unenforceable against and voidable by the consumer, borrower, tenant or employee. If the enforcement of such a clause is at issue as a preliminary matter in connection with arbitration, the consumer, borrower, tenant or employee may seek

judicial relief to have the clause declared unenforceable in a court having personal jurisdiction of the parties and subject matter jurisdiction of the issue.

History: Laws 2001, ch. 227, § 5.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Constitutionality of compulsory arbitration statutes, 55 A.L.R.2d 432.

Validity and enforceability of provision for binding arbitration, and waiver thereof, 24 A.L.R.3d 1325.

44-7A-6. Application for judicial relief.

(a) Except as otherwise provided in Section 28 [44-7A-28 NMSA 1978], an application for judicial relief under the Uniform Arbitration Act [44-7A-1 NMSA 1978] must be made by motion to the court and heard in the manner provided by law or rule of court for making and hearing motions.

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under the Uniform Arbitration Act must be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion must be given in the manner provided by law or rule of court for serving motions in pending cases.

History: Laws 2001, ch. 227, § 6.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Cross references. — As to motions generally, see Rules 1-007 to 1-016 NMRA.

As to service of summons, see Rule 1-004 NMRA.

44-7A-7. Validity of agreement to arbitrate.

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

History: Laws 2001, ch. 227, § 7.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Determination of unconscionability of exceptions in arbitration agreement. — There is no bright-line, fixed, and inflexible rule that excepting from arbitration any claims most likely to be pursued by the defendant drafter will void the arbitration agreement as substantively unconscionable because the exception is unreasonably or unfairly one-sided and against New Mexico public policy. The issue is to be analyzed on a case-by-case basis based on evidence presented on the issues of unreasonableness, unfairness, one-sidedness, and public policy. Bargman v. Skilled Healthcare Grp., Inc., 2013-NMCA-006, 292 P.3d 1, cert. granted, 2012-NMCERT-012.

Where plaintiff, who was a patient in defendant's inpatient rehabilitation facility, signed an arbitration agreement that excluded disputes pertaining to collections; plaintiff sued defendant for damages arising out of the plaintiff's care at defendant's facility; the district court ruled that plaintiff did not have to arbitrate plaintiff's claims because the arbitration agreement was substantively unconscionable; and defendant argued that the collections exclusion was not unreasonable or unfair because collections disputes are not complex and involve small sums, that it is faster and cheaper for a patient and defendant to litigate collection claims rather than to arbitrate them, that under the arbitration agreement, defendant would have to pay the fees for three arbitrators to arbitrate the sums involved in collections which would not be cost effective and deprive defendant of a remedy when a patient failed to pay for services rendered, defendant should be permitted to present evidence tending to show that the collections exclusion

is not unreasonably or unfairly one-sided such that enforcement of the collections exclusion is substantively unconscionable. Bargman v. Skilled Healthcare Grp., Inc., 2013-NMCA-006, 292 P.3d 1, cert. granted, 2012-NMCERT-012.

Contractual prohibition of class actions or arbitration. — Contractual provision which prohibited proceeding on a class-wide basis either in litigation or arbitration, as applied to claims that would be economically inefficient to bring on an individual basis, is contrary to the fundamental public policy of New Mexico to provide a forum for the resolution of all consumer claims and is unenforceable in New Mexico. Fiser v. Dell Computer Corp., 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215.

Arbitration agreement was not unconscionable. — Where a title loan agreement contained an arbitration provision which provided that all claims and disputes were subject to arbitration at the request of either party, except the lender's self-help or judicial remedies, including repossession or foreclosure, and that in the event of a default, the lender could exercise its rights in court and the debtor could not require the lender's action be arbitrated, the arbitration provision was substantively unconscionable and unenforceable. Rivera v. Am. Gen. Fin. Servs., Inc., 2010-NMCA-046, 148 N.M. 784, 242 P.3d 351, rev'd, 2011-NMSC-033, 150 N.M. 398, 255 P.3d 803.

Where a title loan agreement contained an arbitration provision which provided that all claims and disputes were subject to arbitration at the request of either party except the lender's self-help or judicial remedies, including repossession or foreclosure with respect to the vehicle that secured the loan, and that in the event of a default, the lender could exercise any other rights it had at law or equity or under the loan note or any instrument securing the loan note, including suing the borrower for amounts owed or repossessing any property given as security, the arbitration provision was not substantively unconscionable because the arbitration provision allowed the borrower to compel arbitration of disputes about the loan note itself and restored to the lender its statutory protections as a secured creditor or procedurally unconscionable as a contract of adhesion because there was no evidence that the lender had a monopoly on title loans in New Mexico or that the borrower would not be able to get a title loan under different terms through a different lender. Rivera v. Am. Gen. Fin. Servs., Inc., 2010-NMCA-046, 148 N.M. 784, 242 P.3d 351, rev'd, 2011-NMSC-033, 150 N.M. 398, 259 P.3d 803.

Arbitration agreement was supported by consideration. — Where a title loan agreement contained an arbitration provision which provided that all claims and disputes were subject to arbitration at the request of either party except the lender's judicial and extra-judicial remedies with respect to collateral; and the agreement did not allow the lender to alter the agreement to arbitrate claims that the lender brings against the borrower, the arbitration agreement was supported by consideration. Rivera v. Am. Gen. Fin. Servs., Inc., 2010-NMCA-046, 148 N.M. 784, 242 P.3d 351, rev'd, 2011-NMSC-033, 150 N.M. 398, 259 P.3d 803.

Unconscionable arbitration contract. — The provisions of a small loan company's arbitration form that limited a borrower to mandatory arbitration as a forum to settle all disputes whatsoever, while reserving for the lender the exclusive option of access to the courts for all remedies the lender was most likely to pursue against a borrower, are substantively unconscionable and unenforceable. Cordova v. World Fin. Corp. of N.M., 2009-NMSC-021, 146 N.M. 256, 208 P.3d 901.

Arbitration agreement was substantively unconscionable. — Where a nursing home admission agreement contained an arbitration agreement which provided that all disputes between the parties were subject to arbitration, but excepted guardianship proceedings, collection, and eviction actions initiated by the nursing home and disputes involving less than $2,500 from binding arbitration and provided that the excepted proceedings and actions were subject to litigation in court; and the most likely claims a nursing home would have against a resident relate to the collection of fees through guardianship proceedings and collection actions and the termination of services through eviction, the arbitration agreement was substantively unconscionable and unenforceable because the agreement exempted from arbitration the most likely claims that the nursing home would have against a resident, while subjecting the resident's most likely claims to arbitration. Figueroa v. THI of New Mexico, 2013-NMCA-077, cert. denied, 2012-NMCERT-010.

Savings clause in unconscionable arbitration agreement could not be applied. — Where a nursing home admission agreement contained an arbitration agreement that was unconscionable because it exempted from arbitration the most likely claims that the nursing home would have against a resident, while subjecting the resident's most likely claims to arbitration, the exemption of certain claims from arbitration was so central to the agreement that, irrespective of the savings clause in the agreement, the exemption clause was incapable of separation from the agreement to arbitrate and severing the exemption clause and requiring the resident to arbitrate a claim that was unlikely to be litigated by the nursing home would perpetuate the unfairness for which the equitable unconscionablity defense is imposed. Figueroa v. THI of N.M., 2013-NMCA-077, cert. denied, 2012-NMCERT-010.

Where the terms of an arbitration agreement that plaintiff signed upon plaintiff's admission to defendants' nursing home required the parties to arbitrate all disputes associated with the agreement and the relationship created by the admission agreement, except disputes pertaining to collections or discharge of residents, the arbitration agreement was substantively unconscionable and unenforceable because the arbitration agreement permitted the nursing home to litigate its most likely and beneficial claims while excluding access to the courts for claims regarding negligent care, the most likely claims to be pursued by a resident. Ruppelt v. Laurel Healthcare Providers, LLC, 2013-NMCA-014, 293 P.3d 902, cert. denied, 2012-NMCERT-012.

Federal Artibration Act not applicable to unconscionable arbitration contract. — The court's ruling that the provisions of a small loan company's arbitration form that limited a borrower to mandatory arbitration as a forum to settle all disputes whatsoever,

while reserving for the lender the exclusive option of access to the courts for all remedies the lender was most likely to pursue against a borrower are substantively unconscionable and unenforceable is not inconsistent with the dictates of the Federal Arbitration Act, 9 U.S.C. § 2. Cordova v. World Fin. Corp. of N.M., 2009-NMSC-021, 146 N.M. 256, 208 P.3d 901.

Unconscionability analysis does not violate the Federal Arbitration Act. — The unconscionability analysis of arbitration agreements does not violate the Federal Arbitration Act, 9 U.S.C. §§ 1-6, because under New Mexico law, the unconscionability analysis is applied on an equal basis for all contracts to determine whether the terms of a contract are so unfairly unequal as to prevent enforcement of the contract. Figueroa v. THI of N.M., 2013-NMCA-077, cert. denied, 2012-NMCERT-010.

Where the membership of a member of the National Association of Securities Dealers has lapsed, the lapsed member cannot compel arbitration with a customer under the NASD rules after the lapse of the member's NASD membership. Medina v. Holguin, 2008-NMCA-161, 145 N.M. 303, 197 P.3d 1085.

Terms of arbitration agreement delivered with shipment of goods. — A customer who purchases goods over the telephone or the internet; who is informed of the terms and conditions of the sale, including an arbitration agreement when the product is delivered; and who is given a specific number of days in which to return the product, is deemed to have accepted the terms and conditions, including the arbitration agreement, unless the product is returned within the specified time period. Fiser v. Dell Computer Corp., 2007-NMCA-087, 142 N.M. 331 165 P.3d 328, rev'd on other grounds, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215.

Arbitration agreement was illusory and lacked consideration. — An employer's arbitration agreement which permitted the employer to unilaterally amend or revoke the arbitration agreement at any time after a claim had accrued, but before an arbitration proceeding had been initiated, was invalid because the employer's promise to arbitrate was illusory and lacked consideration. Flemma v. Halliburton Energy Servs. Inc., 2013-NMSC-022, rev'g 2012-NMCA-009, 269 P.3d 931.

Arbitration agreement valid under Texas law that is unconscionable under New Mexico law is not enforceable in New Mexico under Texas law. — Where an arbitration agreement between plaintiff and defendant was formed while plaintiff was working for defendant in Texas; the arbitration agreement was enforceable under Texas law; while plaintiff was working for defendant in New Mexico, defendant terminated plaintiff; and the arbitration agreement permitted defendant to unilaterally amend or revoke the agreement at any time after a claim had accrued, but before an arbitration proceeding had been initiated, the arbitration agreement was not enforceable in New Mexico under Texas law because, under New Mexico law, the arbitration agreement was unconscionable and enforcing the arbitration agreement under Texas law would violate New Mexico public policy. Flemma v. Halliburton Energy Servs. Inc., 2013-NMSC-022, rev'g 2012-NMCA-009, 269 P.3d 931.

Arbitration agreement was not illusory. — Where the defendant's dispute resolution program included binding arbitration of all employment-related disputes; the program provided that defendant reserved the right to amend or terminate the program at any time by giving at least ten days notice to current employees and that no amendment or termination would apply to a dispute for which a proceeding had been initiated; defendant fired plaintiff; and plaintiff sued defendant for wrongful retaliatory discharge and claimed that the arbitration agreement was not binding because it was illusory, the arbitration agreement was not illusory because defendant's right to amend any aspect of the dispute resolution program ended the moment plaintiff was fired, because plaintiff's status as a continuing employee was severed at that time. Flemma v. Halliburton Energy Services, Inc., 2012-NMCA-009, 269 P.3d 931, cert. granted, 2012-NMCERT-001.

No procedural unconscionability. — Where the resident was admitted to a resident health care facility; the resident designated an agent to complete the admission paperwork; the admission agreement included a form that required the resident to either reject or accept arbitration as the method of resolving disputes; the director of the facility reviewed the admission agreement with the agent, instructed the agent to read the dispute resolution form, and explained to the agent that if the agent wanted to reject arbitration, the agent had to mark and initial the appropriate box; the dispute resolution form stated that a resident's agreement to arbitrate was not a condition to admission and explained the consequences of choosing arbitration; the agent read the admission agreement at the facility and at the agent's home; and the agent chose arbitration, the circumstances surrounding the formation of the arbitration agreement did not render the agreement void for procedural unconscionable. Barron v. Evangelical Lutheran Good Samaritan Soc'y, 2011-NMCA-094, 150 N.M. 669, 265 P.3d 720.

No substantative unconscionability. — An arbitration agreement that requires a buyer to arbitrate its claims against the seller, but does not require the seller to arbitrate its claims against the buyer, is not substantively unconscionable where the parties have provided each other with consideration beyond the promise to arbitrate. Fiser v. Dell Computer Corp., 2007-NMCA-087, 142 N.M. 331 165 P.3d 328, rev'd on other grounds, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215.

Arbitration provision was substantively unconscionable. — Where an arbitration provision in a loan agreement provided that the arbitrator's decision was final and binding, and that if the claim exceeded $100,000 or granted or denied injunctive relief, either party could appeal the award to a three-arbitrator panel; and the practical effect of the appeals provision was that small claims, over which the lender was unlikely to initiate proceedings, were required to be arbitrated, the lender was more likely to appeal claims that met the threshold for appealable claims, and the borrower's claims are more likely to fall below the threshold and be subject to arbitration only, the appeals provision was substantively unconscionable and unenforceable because it constituted an "escape hatch" clause that benefited the lender more than the borrower. Clay v. N.M. Title Loans, Inc., 2012-NMCA-102, 288 P.3d 888, cert. denied, 2012-NMCERT-009.

An arbitration clause is not unconscionable because it precludes class actions. Fiser v. Dell Computer Corp., 2007-NMCA-087, 142 N.M. 331 165 P.3d 328, cert. granted, 2007-NMCERT-006, rev'd, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215.

Denial of trial by jury. — A purchaser who is compelled to arbitrate based not on a statute, but on an arbitration agreement that is voluntarily entered into by the parties, is not denied the constitutional right to trial by jury. Fiser v. Dell Computer Corp., 2007-NMCA-087, 142 N.M. 331 165 P.3d 328, rev'd on other grounds, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215.

Legally enforceable contract required. – Under either the Federal Arbitration Act, 9 U.S.C. §§ 1-16, or the New Mexico Uniform Arbitration Act, a legally enforceable contract is a prerequisite to arbitration; without such a contract, parties will not be forced to arbitrate. Heye v. Am. Golf Corp., Inc., 2003-NMCA-138, 134 N.M. 558, 80 P.3d 495.

Authority of agent to agree to arbitration. — Where the resident, who was mentally competent, alert and oriented, was admitted to a resident health care facility; the resident declined to complete the admission paperwork and told the director of the facility that the principal's grandchild would complete the paperwork; the grandchild told the director that the grandchild was assuming responsibility for the resident's care; the paperwork included a form that required the resident to either reject or accept arbitration as the method of resolving disputes; and the grandchild completed the paperwork and accepted arbitration, the grandchild had actual authority, which was not limited by the resident, and apparent authority to decide whether to reject or accept the arbitration clause in the admission agreement that was signed as part of the admission process and the grandchild's decision to accept arbitration was binding on the principal. Barron v. Evangelical Lutheran Good Samaritan Soc'y, 2011-NMCA-094, 150 N.M. 669, 265 P.3d 720.

Under Federal Arbitration Act, whether valid contract to arbitrate exists is question of state contract law. DeArmond v. Halliburton Energy Servs., Inc., 2003-NMCA-148, 134 N.M. 630, 81 P.3d 573, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Determination of existence of arbitration agreement. — A court may not delegate to the arbitrator the court's obligation to decide the threshold issue of the existence of a binding arbitration agreement. Edward Family Ltd. P'ship v. Brown, 2006-NMCA-083, 140 N.M. 104, 140 P.3d 525, cert. denied, 2006-NMCERT-005, 139 N.M. 567, 136 P.3d 568.

Burden of proof of unconscionability. — Unconscionability is an affirmative contract defense and the party alleging unconscionability has the burden to prove that the contract is unenforceable on that basis. Strausberg v. Laurel Healthcare Providers, LLC, 2013-NMSC-032, rev'g 2012-NMCA-006, 269 P.3d 914.

Burdens of proof. — The party seeking to compel arbitration bears the initial burden to prove that a valid contract exists, by generally showing that the contract is factually supported by an offer, an acceptance, consideration and mutual assent. Once the party who seeks to compel arbitration has satisfied the initial burden of proving the formation of a valid contract, the burden shifts to the party opposing arbitration to demonstrate that an affirmative defense, such as unconscionability, renders the contract unenforceable. Strausberg v. Laurel Healthcare Providers, LLC, 2013-NMSC-032, rev'g 2012-NMCA-006, 269 P.3d 914.

Burden of proof of validity. — When a nursing home relies upon an arbitration agreement signed by a patient as a condition for admission to the nursing home, and the patient contends that the arbitration agreement is unconscionable, the nursing home has the burden of proving that the arbitration agreement is not unconscionable. Strausberg v. Laurel Healthcare Providers, LLC, 2012-NMCA-006, 269 P.3d 914, cert. granted, 2012-NMCERT-001, rev'd, 2013-NMSC-032.

Rule preempted by the Federal Arbitration Act. — The rule that a nursing home seeking to compel arbitration has the burden of proving that the arbitration agreement is not unconscionable is preempted by the Federal Arbitration Act, 9 U.S.C. §§ 1-16, because the rule singles out arbitration agreements for special treatment by presuming that all nursing home arbitration agreements are unconscionable. Strausberg v. Laurel Healthcare Providers, LLC, 2013-NMSC-032, rev'g 2012-NMCA-006, 269 P.3d 914.

The employer failed to prove the elements of acceptance and mutual assent to an arbitration agreement contained in materials mailed to the employee's home which provided that continued employment would constitute acceptance of the agreement where there was no evidence that the employee actually read the agreement and the employer did not provide an agreement or acknowledgment form for the employee to sign; the court would not equate presumed receipt with actual knowledge. DeArmond v. Halliburton Energy Servs., Inc., 2003-NMCA-148, 134 N.M. 630, 81 P.3d 573, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Arbitration agreement to be interpreted by rules of contract law. — A valid arbitration contract must possess mutuality of obligation; mutuality means both sides must provide consideration. Heye v. Am. Golf Corp., Inc., 2003-NMCA-138, 134 N.M. 558, 80 P.3d 495.

Where an employment arbitration agreement was a preprinted form contract and there was no suggestion that the employer sought or received any input from the employee in connection with the drafting of the language, the agreement would be construed against the employer-drafter where it contained conflicting provisions. Heye v. Am. Golf Corp., Inc., 2003-NMCA-138, 134 N.M. 558, 80 P.3d 495.

An employment arbitration agreement which contained conflicting provisions as to whether it was binding on the employer, construed against the employer, gave the employer unfettered discretion to terminate arbitration at any time; the promise,

therefore, was illusory and did not provide the consideration necessary to enforce the arbitration agreement. Heye v. Am. Golf Corp., Inc., 2003-NMCA-138, 134 N.M. 558, 80 P.3d 495.

The terms of the arbitration agreement are to be interpreted by the rules of contract law. Christmas v. Cimarron Realty Co., 98 N.M. 330, 648 P.2d 788 (1982).

Arbitrator must initially determine scope of arbitration. — Where an employee agreed to arbitrate the employee's grievances; the arbitration agreement provided that the arbitration would resolve all matters raised in the employee's complaint and that the arbitrator had exclusive authority to resolve disputes relating to the scope of the arbitration agreement; there was a dispute between the employer and the employee as to the scope of the arbitration; the employee agreed with the employer to narrow the scope of the arbitration, while unilaterally reserving the right to litigate other issues; the employee did not raise the scope-of-arbitration issues with the arbitrator; the arbitrator ruled in favor of the employee; and the employee subsequently filed a lawsuit in which the employee alleged more expansive claims arising out of the same subject matter as the arbitration agreement, the employee was obligated to obtain a scope-of-arbitration ruling first from the arbitrator, and because the employee never obtained a ruling, the district court correctly dismissed the lawsuit. Home v. Los Alamos Nat'l Sec., L.L.C., 2013-NMSC-004, 296 P.3d 478.

Unforeseeable conduct is not within the scope of an arbitration provision. — Claims based on conduct that is unforeseeable to the parties at the time of entering into an agreement, including an arbitration provision, are not within the scope of the arbitration provision as a matter of law. Clay v. N.M. Title Loans, Inc., 2012-NMCA-102, 288 P.3d 888, cert. denied, 2012-NMCERT-009.

Tort claim was not within scope of arbitration provision in loan agreement. — Where borrower signed a loan agreement with lender and used borrower's truck to secure the loan; the arbitration clause in the loan agreement required arbitration of any claim between borrower and lender that arose from or related to the agreement or the borrower's truck; borrower failed to repay the loan; when borrower resisted the attempt by employees of a repossession business to repossess the truck for lender, one of the employees shot borrower; and borrower sued lender alleging tort claims arising out of the shooting, borrower's tort claims were not within the scope of the arbitration provision because illegal or negligent conduct during repossession was outside the scope of the loan agreement and the arbitration provision. Clay v. N.M. Title Loans, Inc., 2012-NMCA-102, 288 P.3d 888, cert. denied, 2012-NMCERT-009.

Arbitration agreement valid under Texas contract law was enforceable in New Mexico. — Where, during the course of plaintiff's twenty-six years of employment with defendant, defendant on four separate mailings notified plaintiff that continued employment with defendant constituted plaintiff's acceptance of the terms of defendant's dispute resolution program, which included binding arbitration of all employment-related disputes; when plaintiff was assigned to work for defendant's

international organization, plaintiff signed an agreement that plaintiff would remain employed by defendant and the terms of defendant's dispute resolution program would apply to plaintiff; while plaintiff was working for defendant in New Mexico, plaintiff sued defendant for wrongful and retaliatory discharge; under Texas law, plaintiff was presumed to have received the mailings and plaintiff's continued employment with defendant constituted acceptance of defendant's dispute resolution program; under New Mexico law, an employer is required to prove that an employee had actual notice of an offer and actual acknowledgement that continued employment constituted acceptance of the offer; and the only difference between Texas and New Mexico law was the evidentiary requirements of contract formation, the mere difference between Texas and New Mexico in terms of the evidentiary requirements of contract formation were insufficient to overcome the place-of-formation rule on public policy grounds, the arbitration agreement was enforceable under Texas law, and plaintiff was bound to arbitration. Flemma v. Halliburton Energy Services, Inc., 2012-NMCA-009, 269 P.3d 931, cert. granted, 2012-NMCERT-001.

Test to determine whether a court may designate an arbitration provider. — If the parties' designation of a particular arbitration provider was integral to the parties' agreement to arbitrate, then the court cannot appoint a substitute arbitrator if the designated arbitrator is not available. If the parties' designation of an arbitration provider was an ancillary logistical concern, a court can appoint a substitute provider. An arbitration provider is an ancillary logistical concern where the arbitration provisions do not specifically designate a provider or give the parties a choice of providers. The express designation of a single arbitration provider; the designation of the rules of a specific arbitration provider; and mandatory, as opposed to permissive, contractual language are factors that indicate that a particular provider is integral to the parties' agreement to arbitrate. Rivera v. Am. Gen. Fin. Servs., Inc., 2011-NMSC-033, 150 N.M. 398, 259 P.3d 803, rev'g 2010-NMCA-046, 148 N.M. 784, 242 P.3d 351.

Arbitration agreement was unenforceable. — Where the arbitration provision in a title loan agreement named the National Arbitration Forum exclusively throughout the provisions of the agreement, provided that the arbitration would be conducted under the rules and procedures of the National Arbitration Forum, required the parties to use the forms prescribed by the National Arbitration Forum, required the National Arbitration Forum to provide a list of potential arbitrators, provided that the National Arbitration Forum would determine the costs each party would pay; and the National Arbitration Forum was precluded from arbitrating consumer disputes, the arbitration provision was unenforceable because arbitration before the National Arbitration Forum was integral to the agreement to arbitrate, precluding a court from appointing a substitute arbitrator. Rivera v. Am. Gen. Fin. Servs., Inc., 2011-NMSC-033, 150 N.M. 398, 259 P.3d 803, rev'g 2010-NMCA-046, 148 N.M. 784, 242 P.3d 351.

Agreement defines scope of jurisdiction of arbitration. — Parties contracting to resolve disputes by arbitration are bound by their agreement. The terms of the agreement define the scope of the jurisdiction, conditions, limitations and restrictions on

the matters to be arbitrated. Christmas v. Cimarron Realty Co., 98 N.M. 330, 648 P.2d 788 (1982).

Claim not within the scope of arbitration provision. — Where the focus of the arbitration provision contained in a warranty package for new homes was on the warranty against defects and the repair and replacement of covered defects in the new homes, and even though the arbitration provision included claims of breach of contract and negligent or intentional misrepresentation, the arbitration provision did not apply to representations made to prospective purchasers that the land adjacent to the new homes would remain open space. Campos v. Homes by Joe Boyden. L.L.C., 2006-NMCA-086, 140 N.M. 122, 140 P.3d 543, cert. denied, 2006-NMCERT-007, 140 N.M. 279, 142 P.3d 360.

Waiver of exclusive authority of arbitrator to decide arbitrability. — Where the terms of an arbitration agreement that plaintiff signed upon plaintiff's admission to defendants' nursing home required the parties to arbitrate all disputes associated with the agreement and the relationship created by the admission agreement, except disputes pertaining to collections or discharge of residents; plaintiff challenged the enforceability of the entire arbitration agreement; and defendants voluntarily addressed the enforceability of the arbitration agreement in district court and never suggested that the district court did not have authority to address the issue, defendants waived their argument that the arbitrator had exclusive authority to decide arbitrability. Ruppelt v. Laurel Healthcare Providers, LLC, 2013-NMCA-014, 293 P.3d 902, cert. denied, 2012-NMCERT-012.

Where arbitration agreement was not supported by consideration, no contract was formed. Piano v. Premier Distrib. Co., 2005-NMCA-018, 137 N.M. 57, 107 P.3d 11, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 73.

Continued at-will employment is an illusory promise that cannot be consideration for an arbitration agreement. Piano v. Premier Distrib. Co., 2005-NMCA-018, 137 N.M. 57, 107 P.3d 11, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 73.

Arbitration agreement will be given broad interpretation. — When the parties agree to arbitrate any potential claims or disputes arising out of their relationships by contract or otherwise, the arbitration agreement will be given broad interpretation, unless the parties themselves limit arbitration to specific areas or matters. Barring such limiting language, the courts only decide the threshold question of whether there is an agreement to arbitrate. K.L. House Constr. Co. v. City of Albuquerque, 91 N.M. 492, 576 P.2d 752 (1978).

Ability to unilaterally change agreement. — One party's promise to arbitrate is illusory where it retained the ability to unilaterally change the arbitration agreement. Piano v. Premier Distrib. Co., 2005-NMCA-018, 137 N.M. 57, 107 P.3d 11, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 73.

Forum for resolution of disputed interpretation. — Where a complaint for declaratory judgment raises questions of law arising from the disputed interpretation of an arbitration contract, the proper forum for resolution of such questions is the trial court. Guar. Nat'l Ins. Co. v. Valdez, 107 N.M. 764, 764 P.2d 1322 (1988).

Arbitration not binding. — To the extent that, pursuant to contract, arbitration is not binding, there exists no arbitration agreement to be bound by an arbitrator's award, and, therefore, a party with a contractual right to an appeal de novo, as well as an aggrieved party under Section 66-5-303 NMSA 1978, the de novo trial provision of the uninsured motorist insurance law, has a right to seek a de novo trial in district court. Allstate Ins. Co. v. Perea, 2000-NMCA-070, 129 N.M. 364, 8 P.3d 166, overruled by Padilla v. State Farm Mut. Auto. Ins. Co., 2003-NMSC-011, 133 N.M. 661, 68 P.3d 901.

When trial court determines force of disputed contract. — When a petition is filed to compel arbitration pursuant to a contract's arbitration clause and the responding party denies the existence or validity of the contract, the trial court must determine whether the contract is still in force to compel the requested arbitration. Gonzales v. United S.W. Nat'l Bank, 93 N.M. 522, 602 P.2d 619 (1979).

Arbitration provision providing for limited de novo appeal substantively unconscionable. — The limited de novo appeal provision in an insurance contract, providing for mandatory arbitration which would be binding on both parties for any award of damages not exceeding the limits of the Mandatory Financial Responsibility Act but providing for de novo appeal by either party of awards over that amount, violates public policy and is void as substantively unconscionable. Padilla v. State Farm Mut. Auto. Ins. Co., 2003-NMSC-011, 133 N.M. 661, 68 P.3d 901.

Question of arbitrability is for the court to decide. — Where plaintiff filed a class action to challenge the validity of an online loan agreement; the loan agreement contained an arbitration provision in which the parties delegated questions of arbitrability to the arbitrator; plaintiff did not specifically challenge the validity of the delegation clause in the complaint; and when defendants filed motions to compel arbitration, plaintiff raised specific challenges to the validity of the delegation clause that were distinct from the challenges to the loan agreement, the court, not the arbitrator, had jurisdiction to determine the question of the validity of the arbitration provision. Felts v. CLK Mgmt., Inc., 2011-NMCA-062, 149 N.M. 681, 254 P.3d 124, cert. granted, 2011-NMCERT-006, 150 N.M. 764, 266 P.3d 633.

Court had jurisdiction to determine the scope of arbitration provision. — Where an arbitration provision in a loan agreement contained a "delegation provision" which defined an arbitrable "claim" to include disputes about the validity, enforceability, arbitrability, or scope of the arbitration provision, and the borrower specifically challenged the delegation provision by arguing that there was fraud in the inducement based on an alleged misrepresentation by the lender of the neutrality of the two organizations identified to administer the arbitration proceedings, and the fact that both organizations had stopped administrating arbitration of collections and that borrower

justifiably relied on the representation of neutrality, the court had jurisdiction to determine the scope of the arbitration provision. Clay v. N.M. Title Loans, Inc., 2012-NMCA-102, 288 P.3d 888, cert. denied, 2012-NMCERT-009.

Ban on class-wide arbitration was unconscionable. — Where a loan agreement contained an arbitration provision that banned class-wide arbitration and substantial evidence showed that the likelihood that plaintiff's costs in bringing an individual claim would exceed plaintiff's damages was reasonably certain and that a meaningful remedy for plaintiff's claims was only available through class action relief, the class action ban in the arbitration provision was substantively unconscionable and unenforceable. Felts v. CLK Mgmt., Inc., 2011-NMCA-062, 149 N.M. 681, 254 P.3d 124, cert. granted, 2011-NMCERT-006, 150 N.M. 764, 266 P.3d 633.

Ban on class-wide arbitration was not severable from arbitration provision. — Where a loan agreement contained an arbitration provision that banned class-wide arbitration; the class action ban was a key limitation to the means by which the parties could resolve their disputes under the loan agreement; the class action ban was substantively unconscionable and unenforceable; and the class action ban was not severable from the remainder of the arbitration provision, the entire arbitration provision was unenforceable. Felts v. CLK Mgmt., Inc., 2011-NMCA-062, 149 N.M. 681, 254 P.3d 124, cert. granted, 2011-NMCERT-006, 150 N.M. 764, 266 P.3d 633.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution § 70 et seq.

Validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction, 12 A.L.R.3d 892.

Validity and construction of provision for arbitration of disputes as to alimony or support payments, or child visitation or custody matters, 38 A.L.R.5th 69.

Validity and enforceability of provision for binding arbitration, and waiver thereof, 24 A.L.R.3d 1325.

Validity and construction of agreement between attorney and client to arbitrate disputes arising between them, 26 A.L.R.5th 107.

Participation in arbitration proceedings as waiver to objections to arbitrability under state law, 56 A.L.R.5th 757.

Validity and effect under state law of arbitration agreement provision for laternative method of appointment of arbitrator where one party fails or refuses to follow appointment procedure specified in agreement, 75 A.L.R.5th 595.

Validity and effect under Federal Arbitration Act (9 U.S.C.A. § 1 et seq.) of arbitration agreement provision for alternative method of appointment of arbitrator where one party

fails or refuses to follow appointment procedure specified in agreement, 159 A.L.R. Fed. 1

6 C.J.S. Arbitration § 14.

44-7A-8. Motion to compel or stay arbitration.

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(1) if the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate; and

(2) if the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(b) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(c) If the court finds that there is no enforceable agreement, it may not pursuant to Subsection (a) or (b) order the parties to arbitrate.

(d) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.

(e) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion under this section must be made in that court. Otherwise, a motion under this section may be made in any court as provided in Section 28 [44-7A-28 NMSA 1978].

(f) If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(g) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

History: Laws 2001, ch. 227, § 8.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

No right to compel arbitration. — Where defendants offered investment packages to the public that consisted of interests in real property; plaintiff invested in three properties; defendants created the third parties to act as the seller of the real property; the purchase agreements contained arbitration clauses; plaintiff sued defendants for violations of the New Mexico Securities Act of 1986, Section 58-13B-1 NMSA 1978 et seq. [repealed]; plaintiff did not assert any claims against the third parties or allege any interdependent or concerted misconduct between defendants and the third parties; defendants filed complaints against the third parties for indemnity on the ground that the third parties sold the real property interests that comprised the alleged securities that plaintiff bought; defendants asserted the affirmative defense that plaintiff's claims were subject to the arbitration clauses in the purchase agreements; and the third parties filed a motion to compel arbitration on all disputes, defendants did not have an independent right to compel arbitration because the alleged violations of the Securities Act did not hinge on the terms of the purchase agreements and the third parties could not assert the arbitration defense because it could not be independently asserted by defendants. Frederick v. Sun 1031, LLC, 2012-NMCA-118, 293 P.3d 934.

Arbitration agreement required. — The district court may not compel arbitration absent an arbitration agreement. Alexander v. Calton & Assocs., Inc., 2005-NMCA-034, 137 N.M. 293, 110 P.3d 509.

Waiver. — A mere request for arbitration filed with the NASD cannot by itself be sufficient to waive the right to contest arbitration and require proof of the existence of an arbitration agreement in court. Alexander v. Calton & Assocs., Inc., 2005-NMCA-034, 137 N.M. 293, 110 P.3d 509.

Valid arbitration defense does not divest the court of jurisdiction and is not properly raised by a motion to dismiss for lack of subject matter jurisdiction. When parties have agreed to arbitrate, however, a court should order arbitration. Daniels Ins. Agency, Inc. v. Jordan, 99 N.M. 297, 657 P.2d 624 (1982).

Role of court. — Under this section, it is the court's duty to order arbitration where provision for it is clear. Where provision for arbitration is disputed, the court's function is to determine whether there is an agreement to arbitrate and to order arbitration where an agreement to arbitrate is found. Bernalillo Cnty. Med. Ctr. Employees' Ass'n Local 2370 v. Cancelosi, 92 N.M. 307, 587 P.2d 960 (1978).

Standard for granting motion. — As with a summary judgment motion, a motion to compel arbitration may only be granted as a matter of law when there is no genuine issue of material fact as to the existence of an agreement; only then should the court decide the existence of the agreement as a matter of law. DeArmond v. Halliburton

Energy Servs., Inc., 2003-NMCA-148, 134 N.M. 630, 81 P.3d 573, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Uninsured motorist claim. — New Mexico law does not require arbitration of an uninsured motorist claim upon the unilateral demand of either the insurer or the insured where the insurance policy states that disputes regarding whether the insured is entitled to receive payment under the policy, or the amount of payment due, will be submitted to arbitration only if both the insurer and insured consent. McMillian v. Allstate Indem. Co., 2004-NMSC-002, 135 N.M. 17, 84 P.3d 65.

No judicial power to compel consolidated arbitration. — Absent express statutory authorization or agreement of all concerned parties, district court had no power to compel consolidated arbitration. Pueblo of Laguna v. Cillessen & Son, 101 N.M. 341, 682 P.2d 197 (1984).

When trial court determines force of disputed contract. — When a petition is filed to compel arbitration pursuant to a contract's arbitration clause and the responding party denies the existence or validity of the contract, the trial court must determine whether the contract is still in force to compel the requested arbitration. Gonzales v. United S.W. Nat'l Bank, 93 N.M. 522, 602 P.2d 619 (1979).

Right to arbitration not waived. — Where between the date a complaint was filed and the date a motion for arbitration was filed, the only pleadings filed were: (1) a complaint; (2) a motion to dismiss; (3) a first amended complaint; and (4) a motion requesting the trial court to submit the issues to arbitration, the case was not at issue and the right to arbitration had not been waived. Bernalillo Cnty. Med. Ctr. Employees' Ass'n Local 2370 v. Cancelosi, 92 N.M. 307, 587 P.2d 960 (1978).

Right to arbitration not waived by mere filing of complaint. — When the demand for arbitration follows initiation of proceedings in court, going to the merits of the dispute, a question of waiver is sometimes raised, but the mere filing of a complaint does not constitute a waiver of a right to arbitration. Bernalillo Cnty. Med. Ctr. Employees' Ass'n Local 2370 v. Cancelosi, 92 N.M. 307, 587 P.2d 960 (1978).

Unlicensed business cannot compel arbitration. — Texas corporations unauthorized to do business in New Mexico were unable to compel two dentists to arbitrate a dispute arising from an alleged breach of architectural and construction contracts for the construction of dental offices because a suit to compel arbitration is essentially a suit for specific performance and the corporations, not licensed to do business in New Mexico, cannot perform. Shaw v. Kuhnel & Assocs., 102 N.M. 607, 698 P.2d 880 (1985).

Fraud in the inducement not issue for arbitrator. — It is for a court to determine issues of fraud in the inducement of a contract, not an arbitrator; if no fraud is found, the remaining issues can proceed to arbitration. Shaw v. Kuhnel & Assocs., 102 N.M. 607, 698 P.2d 880 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution § 126 et seq.

Disqualification of arbitrator by court or stay of arbitration proceedings prior to award, on ground of interest, bias, prejudice, collusion or fraud of arbitrators, 65 A.L.R.2d 755.

Statute of limitations as bar to arbitration under agreement, 94 A.L.R.3d 533.

Defendant's participation in action as waiver of right to arbitration of dispute involved therein, 98 A.L.R.3d 767.

Which statute of limitations applies to efforts to compel arbitration of a dispute, 77 A.L.R.4th 1071.

What statute of limitations applies to action to compel arbitration pursuant to § 301 of Labor Management Relations Act (29 USCS § 185), 96 A.L.R. Fed. 378.

6 C.J.S. Arbitration §§ 30 to 32, 39, 45, 46.

44-7A-9. Provisional remedies.

(a) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(b) After an arbitrator is appointed and is authorized and able to act:

(1) the arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action; and

(2) a party to an arbitration proceeding may move the court for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy.

(c) A party does not waive a right of arbitration by making a motion under Subsection (a) or (b).

History: Laws 2001, ch. 227, § 9.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

44-7A-10. Initiation of arbitration.

(a) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under Section 16(c) [44-7A-16 NMSA 1978] not later than the beginning of the arbitration hearing, the person by appearing at the hearing waives any objection to lack of or insufficiency of notice.

History: Laws 2001, ch. 227, § 10.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution § 177.

6 C.J.S. Arbitration § 76.

44-7A-11. Consolidation of separate arbitration proceedings.

(a) Except as otherwise provided in Subsection (c), upon motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(1) there are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;

(2) the claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(3) the existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

(4) prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

History: Laws 2001, ch. 227, § 11.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

No judicial power to compel consolidated arbitration. — Absent express statutory authorization or agreement of all concerned parties, district court had no power to compel consolidated arbitration. Pueblo of Laguna v. Cillessen & Son, 101 N.M. 341, 682 P.2d 197 (1984).

Consolidation may be ordered even if no arbitration proceeding is pending, provided there are agreements to arbitrate. Lyndoe v. D.R. Horton, Inc., 2012-NMCA-103, 287 P.3d 357.

The question of whether to consolidate separate arbitrations is a threshold question for the district court and does not require definitive proof. Lyndoe v. D.R. Horton, Inc., 2012-NMCA-103, 287 P.3d 357.

Elements supporting consolidation were satisfied. — Where the owners of homes asked the district court to compel defendants to litigate their claims in a consolidated arbitration; the dispute was subject to the arbitration clause in the owners' purchase agreements; the owners' claims arose out of their purchase of homes built and sold by defendants in the same subdivision; defendants based the subdivision's site development plan on a geotechnical report prepared by a consultant employed by defendants; and the owners alleged that they experienced similar deficiencies in the homes, many of which were caused by the settlement of subsurface soils, that their claims shared common issues involving the settlement of their homes and similar damages, that multiple separate arbitrations could result in conflicting decisions, that any prejudice to defendants did not outweigh the potential prejudice of conflicting

outcomes that could result from a failure to consolidate, and that a consolidated proceeding would be more efficient than separate proceedings, the owners satisfied all of the elements required for consolidation, and the district court did not abuse its discretion by consolidating the arbitrations between the owners and defendants. Lyndoe v. D.R. Horton, Inc., 2012-NMCA-103, 287 P.3d 357.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution § 178.

Consolidation by federal court of arbitration proceedings brought under Federal Arbitration Act (9 USCS § 4), 104 A.L.R. Fed. 251.

44-7A-12. Appointment of arbitrator; service as a neutral arbitrator.

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed unless the method fails. If the parties have not agreed on a method, the agreed method fails or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.

History: Laws 2001, ch. 227, § 12.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution § 148 et seq.

Liability of organization sponsoring or administering arbitration to parties involved in proceeding, 41 A.L.R.4th 1013.

6 C.J.S. Arbitration § 60 et seq.

44-7A-13. Disclosure by arbitrator.

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) a financial or personal interest in the outcome of the arbitration proceeding; and

(2) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness or other arbitrators.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator. If an arbitrator discloses a fact required by Subsection (a) or (b) to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under Section 24(a)(2) [44-7A-24 NMSA 1978] for vacating an award made by the arbitrator.

(c) If the arbitrator did not disclose a fact as required by Subsection (a) or (b), upon timely objection by a party, the court under Section 24(a)(2) may vacate an award.

(d) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party is presumed to act with evident partiality under Section 24(a)(2).

(e) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under Section 24(a)(2).

History: Laws 2001, ch. 227, § 13.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Potential neutral arbitrators need not sever all their ties with the business world. Ormsbee Dev. Co. v. Grace, 668 F.2d 1140 (10th Cir.), cert. denied, 459 U.S. 838, 103 S. Ct. 84, 74 L. Ed. 2d 79 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution § 154 et seq.

Disqualification of arbitrator by court or stay of arbitration proceedings prior to award, on ground of interest, bias, prejudice, collusion or fraud of arbitrators, 65 A.L.R.2d 755.

6 C.J.S. Arbitration § 63.

44-7A-14. Action by majority.

If there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but all of them shall conduct the hearing under Section 16(c) [44-7A-16 NMSA 1978].

History: Laws 2001, ch. 227, § 14.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution § 154 et seq.

6 C.J.S. Arbitration § 90, 91.

44-7A-15. Immunity of arbitrator; competency to testify; attorney's fees and costs.

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by Section 13 [44-7A-13 NMSA 1978] does not cause any loss of immunity under this section.

(d) In a judicial, administrative or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this state acting in a judicial capacity. This subsection does not apply:

(1) to the extent necessary to determine the claim of an arbitrator, arbitration organization or representative of the arbitration organization against a party to the arbitration proceeding; or

(2) to a hearing on a motion to vacate an award under Section 24(a)(1) or (2) [44-7A-24 NMSA 1978] if the movant establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization or representative of an arbitration organization arising from the services of the arbitrator, organization or representative or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of Subsection (d), and the court decides that the arbitrator, arbitration organization or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization or representative reasonable attorney's fees and other reasonable expenses of litigation.

History: Laws 2001, ch. 227, § 15.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of organization sponsoring or administering arbitration to parties involved in proceeding, 41 A.L.R.4th 1013.

44-7A-16. Arbitration process.

(a) An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) if all interested parties agree; or

(2) upon request of one party to the arbitration proceeding, if that party gives notice to all other parties to the proceeding and the other parties have a reasonable opportunity to respond.

(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary, but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear. The court, on request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under Subsection (c), a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

(e) If an arbitrator ceases or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with Section 12 [44-7A-12 NMSA 1978] to continue the proceeding and to resolve the controversy.

History: Laws 2001, ch. 227, § 16.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Effect of failure of proper notice. — Because the appellant was prejudiced by the arbitrator's failure to give him proper notice of the third hearing, and because the failure to give notice was sufficient cause to require the arbitrator to postpone the hearing, the trial court erred when it failed to vacate the arbitration award pursuant to Section 44-7-12A(4) NMSA 1978 (now Section 44-7A-24 NMSA 1978). Jaycox v. Ekeson, 115 N.M. 635, 857 P.2d 35 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution § 177 et seq.

Necessity and sufficiency of notice of and hearing in proceedings before appraisers and arbitrators appointed to determine amount of insurance loss, 25 A.L.R.3d 680.

6 C.J.S. Arbitration § 76 et seq.

44-7A-17. Representation by lawyer.

A party to an arbitration proceeding may be represented by a lawyer.

History: Laws 2001, ch. 227, § 17.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Malcious abuse of process. — Defendant’s initiation of judicial proceedings against the plaintiff is no longer a required element of malicious abuse of process and arbitration proceedings are judicial proceedings for the purpose of the malicious abuse of process tort. Durham v. Guest, 2009-NMSC-007, 145 N.M. 694, 204 P.3d 19.

Attorney liability. — An arbitration proceeding is an adversarial proceeding and an attorney who is representing a client in an arbitration proceeding is not liable for aiding and abetting a breach of the client’s fiduciary duty unless the attorney acts outside the scope of representation, acts only in his or her self-interest and contrary to the client’s interest, or acts in a manner that would fall within the "crime or fraud" exception to the attorney-client privilege. Durham v. Guest, 2007-NMCA-144, 142 N.M. 817, 171 P.3d 756, rev'd on other grounds, 2009-NMSC-007, 145 N.M. 694, 204 P.3d 19.

44-7A-18. Witnesses; subpoenas; depositions; discovery.

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious and cost effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious and cost effective.

(d) If an arbitrator permits discovery under Subsection (c), the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this state.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this state.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this state.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this state and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious and cost effective. A subpoena or discovery-related order issued by an arbitrator in another state must be served in the manner provided by law for service of subpoenas in a civil action in this state and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this state.

History: Laws 2001, ch. 227, § 18.

ANNOTATIONS

Cross references. — As to fees for attendance of witnesses generally, see 10-8-1 to 10-8-7, 38-6-4 NMSA 1978.

As to subpoenas of witnesses and documentary evidence generally, see Rule 1-045 NMRA.

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution § 187 et seq.

Discovery in aid of arbitration proceedings, 98 A.L.R.2d 1247.

6 C.J.S. Arbitration § 170 et seq.

44-7A-19. Judicial enforcement of pre-award ruling by arbitrator.

If an arbitrator makes a pre-award ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under Section 20 [44-7A-20 NMSA 1978]. A prevailing party may make a motion to the court for an expedited order to confirm the award under Section 23 [44-7A-23 NMSA 1978], in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies or corrects the award under Section 24 or 25 [44-7A-24 or 44-7A-25 NMSA 1978].

History: Laws 2001, ch. 227, § 19.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

44-7A-20. Award.

(a) An arbitrator shall make a record of an award. The record must be signed or otherwise authenticated by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(b) An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may do so within or after the time specified or ordered. A party waives any objection that an award was not timely made unless the party gives notice of the objection to the arbitrator before receiving notice of the award.

History: Laws 2001, ch. 227, § 20.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The

Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Delivery method important if delivery does not occur within limits. — Where delivery is not accomplished by the method required by this section, the important consideration is whether delivery actually occurs within the required time. The method becomes important if the delivery is not accomplished within the required time, although the statutory method of posting is complied with. Chaco Energy Co. v. Thercol Energy Co., 97 N.M. 127, 637 P.2d 558 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution § 191 et seq.

Death of party to arbitration agreement before award as revocation or termination of submission, 63 A.L.R.2d 754.

Failure of arbitrators to make award within specified time limit, 56 A.L.R.3d 815.

Referee's failure to file report within time specified by statute, court order, or stipulation as terminating reference, 71 A.L.R.4th 889.

6 C.J.S. Arbitration § 95 et seq.

44-7A-21. Change of award by arbitrator.

(a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

(1) upon a ground stated in Section 25(a)(1) or (3) [44-7A-25 NMSA 1978];

(2) because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) to clarify the award.

(b) A motion under Subsection (a) must be made and notice given to all parties within twenty days after the movant receives notice of the award.

(c) A party to the arbitration proceeding must give notice of any objection to the motion within ten days after receipt of the notice.

(d) If a motion to the court is pending under Section 23, 24 or 25 [44-7A-23, 44-7A-24 or 44-7A-25 NMSA 1978], the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) upon a ground stated in Section 25(a)(1) or (3) [44-7A-25 NMSA 1978];

(2) because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) to clarify the award.

(e) An award modified or corrected pursuant to this section is subject to Sections 20(a), 23, 24 and 25 [44-7A-20, 44-7A-23, 44-7A-24 and 44-7A-25 NMSA 1978].

History: Laws 2001, ch. 227, § 21.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Period for arbitrators' action set by agreement. — Where an arbitration agreement establishes a period beyond which the arbitrators cannot act, it does not prevent them from deciding and disposing of the matter before the expiration of the prescribed period. It does not extend their authority once they make a decision intended to be final and binding on the parties. Chaco Energy Co. v. Thercol Energy Co., 97 N.M. 127, 637 P.2d 558 (1981).

Findings required as to offset against proceeds already received. — Trial court erred in confirming arbitration award without clarification from arbitrators whether offsets for settlement proceeds already received were included in the award calculations. Casias v. Dairyland Ins. Co., 1999-NMCA-046, 126 N.M. 772, 975 P.2d 385, cert. denied, 127 N.M. 389, 981 P.2d 1207.

Effect of amended award. — An amended award for purposes other than those specified in Section 44-7-13A NMSA 1978 [now Section 44-7A-25 NMSA 1978] is void and of no effect. Chaco Energy Co. v. Thercol Energy Co., 97 N.M. 127, 637 P.2d 558 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution § 210.

Award or decision by arbitrators as precluding return of case to, or its reconsideration by them, 104 A.L.R. 710.

Time and jurisdiction for review, reopening, modification or reinstatement of award or agreement, 165 A.L.R. 9

6 C.J.S. Arbitration § 119.

44-7A-22. Remedies; fees and expenses of arbitration proceeding.

(a) An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

(b) An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

(c) As to all remedies other than those authorized by Subsections (a) and (b), an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under Section 23 [44-7A-23 NMSA 1978] or for vacating an award under Section 24 [44-7A-24 NMSA 1978].

(d) An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award.

(e) If an arbitrator awards punitive damages or other exemplary relief under Subsection (a), the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

History: Laws 2001, ch. 227, § 22.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Attorney fees. — The district court has the authority to award attorney fees on appeal even if an arbitration panel lacked the authority to do so. Aguilera v. Palm Harbor Homes, Inc., 2004-NMCA-120, 136 N.M. 422, 99 P.3d 672, cert. denied, 2004-NMCERT-010, 136 N.M. 541, 101 P.3d 807.

Public policy supports punitive damages. — Although former 44-7-1 NMSA 1978 et seq. did not specifically authorize punitive damages awards, the strong public policy in favor of alternative resolution of disputes requires that arbitrators be authorized to award such damages when they are otherwise permitted by law and are supported by the facts. Aguilera v. Palm Harbor Homes, Inc., 2001-NMCA-091, 131 N.M. 228, 34 P.3d 617, aff'd, 2002-NMSC-029, 132 N.M. 715, 54 P.3d 993.

Arbitrators authorized to suggest appropriate amount of punitive damages. — The arbitration panel did not exceed its powers where, in a dispute between an insured and the automobile insurance company, it suggested the appropriate amount of punitive damages to be assessed, if the proper court determined that punitive damages should be awarded. Stewart v. State Farm Mut. Auto. Ins. Co., 104 N.M. 744, 726 P.2d 1374 (1986).

Apportionment of arbitration costs. — The uninsured motorists' insurance statute and the New Mexico Arbitration Act are not in a state of repugnant conflict on the issue of apportionment of arbitration costs. The Arbitration Act merely encompasses the uninsured motorists' insurance statute; it allows the arbitrator to award costs of arbitration to the prevailing party (as does the uninsured motorists' insurance statute) unless the parties contract to award it in some other way. This distinction is not enough to warrant a repeal by implication and does not make the acts irreconcilable. Stinbrink v. Farmers Ins. Co., 111 N.M. 179, 803 P.2d 664 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution §§ 173 et seq., 218 et seq.

6 C.J.S. Arbitration §§ 75, 107, 179 et seq.

44-7A-23. Confirmation of award.

After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to Section 21 or 25 [44-7A-21 or 44-7A-25 NMSA 1978] or is vacated pursuant to Section 24 [44-7A-24 NMSA 1978].

History: Laws 2001, ch. 227, § 23.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Findings required as to offset against proceeds already received. — Trial court erred in confirming arbitration award without clarification from arbitrators whether offsets for settlement proceeds already received were included in the award calculations. Casias v. Dairyland Ins. Co., 1999-NMCA-046, 126 N.M. 772, 975 P.2d 385, cert. denied, 127 N.M. 389, 981 P.2d 1207.

Errors of law and fact. — The district court does not have the authority to review arbitration awards for errors as to the law or the facts; if the award is fairly and honestly

made and if it is within the scope of the submission, the award is a final and conclusive resolution of the parties' dispute. Fernandez v. Farmers Ins. Co., 115 N.M. 622, 857 P.2d 22 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution § 218 et seq.

6 C.J.S. § 120 et seq.

44-7A-24. Vacating award.

(a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) the award was procured by corruption, fraud or other undue means;

(2) there was:

(A) evident partiality by an arbitrator appointed as a neutral arbitrator;

(B) corruption by an arbitrator; or

(C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy or otherwise conducted the hearing contrary to Section 16 [44-7A-16 NMSA 1978], so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 16(c) not later than the beginning of the arbitration hearing; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 10 [44-7A-10 NMSA 1978] so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section must be filed within ninety days after the movant receives notice of the award pursuant to Section 20 [44-7A-20 NMSA 1978] or within ninety days after the movant receives notice of a modified or corrected award pursuant to Section 21 [44-7A-21 NMSA 1978], unless the movant alleges that the award was procured by corruption, fraud or other undue means, in which case the motion must be

made within ninety days after the ground is known or by the exercise of reasonable care would have been known by the movant.

(c) If the court vacates an award on a ground other than that set forth in Subsection (a)(5), it may order a rehearing. If the award is vacated on a ground stated in Subsection (a)(1) or (2), the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in Subsection (a)(3), (4) or (6), the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in Section 20(b) [44-7A-20 NMSA 1978] for an award. If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending.

History: Laws 2001, ch. 227, § 24.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act [44-7-1 to 44-7-22 NMSA 1978], enacted by Laws 1971, ch. 168, §23. It was repleced by Sections 44-7A-1 to 44-7A-32 NMSA 1978.The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Cases under prior law. — The pre-2001 cases cited below were decided under the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978.

Provisions exclusive. — Sections 44-7-12 and 44-7-13 NMSA 1978 (now Section 44-7A-25 NMSA 1978) establish the statutory grounds for vacating, modifying, or correcting an award. In the absence of any of these statutory grounds, the court must confirm an award submitted for review. Fernandez v. Farmers Ins. Co., 115 N.M. 622, 857 P.2d 22 (1993).

Motion filing limitation. — The time limit contained in Subsection B [(b)] of former section for filing a motion to vacate an award applies in arbitration proceedings, not the one-year limitation period set forth in Rule 1-060(B)(6) NMRA. Medina v. Foundation Reserve Ins. Co., 1997-NMSC-027, 123 N.M. 380, 940 P.2d 1175.

Potential neutral arbitrators need not sever all their ties with the business world. Ormsbee Dev. Co. v. Grace, 668 F.2d 1140 (10th Cir.), cert. denied, 459 U.S. 838, 103 S. Ct. 84, 74 L. Ed. 2d 79 (1982).

Record not required for appeal. — The fact that a record is permitted in the arbitration proceeding cannot be construed to mean that a record is a prerequisite to the appeal provisions afforded by the Uniform Arbitration Act. Malibu Pools of N.M., Inc. v. Harvard, 97 N.M. 106, 637 P.2d 537 (1981).

Misconduct of arbitrator in public-sector arbitration. — Where a public sector employer and a union reached an impasse in the negotiation of a new collective bargaining agreement, and the impasse was submitted to arbitration pursuant to the Public Employee Bargaining Act; during the arbitration hearing, the arbitrator permitted the union to make a revised offer and to modify the revised offer several times and asked the parties to confer in an effort to narrow the issues; and at the conclusion of the hearing, the arbitrator suggested modifications of the party's offers that would be more to the liking of the arbitrator and directed the parties to submit modified offers, the arbitrator exceeded the arbitrator's authority under the Public Employee Bargaining Act requiring the arbitrator's award to be vacated on the ground of misconduct under the Uniform Arbitration Act. Nat'l Union of Hosp. Employees v. UNM Bd. of Regents, 2010-NMCA-102, 149 N.M. 107, 245 P.3d 51, cert. denied, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

Arbitrator did not exceed the arbitrator's powers. — Where the state and the unions entered into collectively bargaining agreements that covered salary increases for union employees; the legislature would have to appropriate eight million dollars to fund the salary increases for union employees and sixteen million dollars to fund the same salary increases for all employees; the legislature appropriated thirteen million dollars for salary increases for all employees; the state determined that there were not sufficient funds to cover the full salary increases for union employees and implemented salary increases for all employees that differed from those required by the agreements; the state stipulated to arbitrate whether it had violated the agreements and what the remedy should be for a violation; during the arbitration, the state presented evidence concerning its interpretation of the legislative appropriation bills and whether the legislature had appropriated sufficient funds to cover the union salary increases; and the arbitrator determined that the appropriation bills required only that salary increases for all employees total the average salary increases specified in the appropriation bills, that the legislature had appropriated sufficient funds to cover the salary increases required by the agreements and smaller increases for non-union employees, and that the state's pay package violated the terms of the agreements, the arbitrator did not exceed the arbitrator's authority by directing the state to pay union employees the salary increases required by the agreements. State v. AFSCME Council 18, 2012-NMCA-114, 291 P.3d 600, cert. granted, 2012-NMCERT-011.

Grounds for vacation where record unavailable. — Where a record of the arbitration proceeding is unavailable, an aggrieved party is not thereby precluded from asserting and proving any grounds set forth in this section for vacation of an arbitration award. Malibu Pools of N.M., Inc. v. Harvard, 97 N.M. 106, 637 P.2d 537 (1981).

Record on appeal to contain evidence of claims regarding vacation of award. — Where a party claims that the trial court should vacate the award because the arbitrator allegedly evidenced partiality and exceeded his powers, and the trial court judge reviews the record of the arbitration proceedings, but his findings do not indicate whether the record contains substantial evidence supporting or negating such claims, nor is the record of the arbitration proceedings made a part of the record for appeal, the

case will be remanded to the district court to determine whether the arbitration record supports confirmation, or, in the alternative, vacation or modification of the award. Daniels Ins. Agency, Inc. v. Jordan, 99 N.M. 297, 657 P.2d 624 (1982).

Appellee may argue any grounds for affirmance. — An appellee who does not claim that the trial court erred in vacating an arbitration award has no duty to preserve that issue on appeal. It may argue any grounds for affirmance on appeal and the appellate court will uphold the trial court's decision if it is legally mandated, regardless of whether the trial court's rationale was wrong. Bruch v. CNA Ins. Co., 117 N.M. 211, 870 P.2d 749 (1994), overruled on other grounds by Padilla v. State Farm Mut. Auto. Ins. Co., 2003-NMSC-011, 133 N.M. 661, 68 P.3d 901.

Consent to arbitration required. — By incorporating this section, Section 66-5-303 NMSA 1978 expressly contemplates a district court vacating an arbitration award where the parties did not consent to arbitration. It would be untenable, therefore, to hold that the legislature, in drafting the current uninsured motorist statute, intended to compel arbitration where the parties had agreed not to arbitrate. McMillian v. Allstate Indem. Co., 2004-NMSC-002, 135 N.M. 17, 84 P.3d 65.

Scope of review. — It is not the function of the court to hear the case de novo and consider the evidence presented to the arbitrators, but rather to conduct an evidentiary hearing and enter findings of fact and conclusions of law upon each issue raised in the application to vacate or modify the award. Melton v. Lyon, 108 N.M. 420, 773 P.2d 732 (1989).

Once an arbitration award is entered, the finality of arbitration weighs heavily in its favor and cannot be upset except under exceptional circumstances. Melton v. Lyon, 108 N.M. 420, 773 P.2d 732 (1989).

Errors of law and fact. — The district court does not have the authority to review arbitration awards for errors as to the law or the facts; if the award is fairly and honestly made and if it is within the scope of the submission, the award is a final and conclusive resolution of the parties' dispute. Fernandez v. Farmers Ins. Co., 115 N.M. 622, 857 P.2d 22 (1993).

Under appropriate circumstances the district court may find an arbitration panel's mistake of fact or law so gross as to imply misconduct, fraud, or lack of fair and impartial judgment, each of which is a valid ground for vacating an award. Fernandez v. Farmers Ins. Co., 115 N.M. 622, 857 P.2d 22 (1993).

Legal and factual mistakes, such as applying the wrong standard of proof, do not comprise an abuse of power under Subsection A(3) (now (a)(4)). Town of Silver City v. Garcia, 115 N.M. 628, 857 P.2d 28 (1993).

Preservation of objections. — Under Subsection (a)(5) of Section 44-7A-24 NMSA 1978, a party may continue to argue that there is no agreement to arbitrate even after

arbitration is completed, so long as he preserves his objections before the hearing begins. Alexander v. Calton & Assocs., Inc., 2005-NMCA-034, 137 N.M. 293, 110 P.3d 509.

Alleged misconduct of panel as grounds. — A trial court errs in refusing to hear evidence of an arbitration panel's alleged misconduct for its failure to hear evidence material to the controversy. Malibu Pools of N.M., Inc. v. Harvard, 97 N.M. 106, 637 P.2d 537 (1981).

Material evidence not excluded. — "Material" evidence is evidence that relates to the matter in dispute or has a reasonable bearing on the issue to be decided in a given case. In the instant case, the stipulated issue to be decided by the arbitrator was whether the policeman had sex with a minor while on duty. Evidence that the policeman had sex with women other than the minor while on duty is not material to the specific issue presented to the arbitrator for decision and thus does not provide a basis for vacating the arbitration award under Subsection A(4) (now (a)(3)). Town of Silver City v. Garcia, 115 N.M. 628, 857 P.2d 28 (1993).

Arbitrator partiality. — To vacate an arbitration award under Subsection A(2) (now (a)(2)(A)), evidence of arbitrator partiality must be direct, definite and capable of demonstration rather than remote, uncertain, or speculative. Partiality cannot be imputed from the methods by which an arbitrator considers and evaluates evidence. Partiality cannot be inferred from adverse evidentiary rulings or from the enforcement of procedural rules. Town of Silver City v. Garcia, 115 N.M. 628, 857 P.2d 28 (1993).

The arbitrator's predisposition to discredit testimony not yet given suggests that the arbitration award could be vacated due to the arbitrator's apparent lack of impartiality. Jaycox v. Ekeson, 115 N.M. 635, 857 P.2d 35 (1993).

Requesting trial if award exceeds statutory minimum. — The limited de novo appeal provision in an insurance contract, providing for mandatory arbitration which would be binding on both parties for any award of damages not exceeding the limits of the Mandatory Financial Responsibility Act but providing for de novo appeal by either party of awards over that amount, violates public policy and is void as substantively unconscionable. Padilla v. State Farm Mut. Auto. Ins. Co., 2003-NMSC-011, 133 N.M. 661, 68 P.3d 901 (overruling Bruch v. CNA Ins. Co., 117 N.M. 211, 870 P.2d 749 (1994)).

Burden of establishing fraud. — The party asserting fraud must establish it by clear and convincing evidence and must show that due diligence could not have resulted in discovery of the fraud prior to arbitration. Foster v. Turley, 808 F.2d 38 (10th Cir. 1986).

Fraud, corruption and undue means established. — In a proceeding to vacate an arbitration award of uninsured motorist benefits, there was substantial evidence to support findings of fact and conclusions of law that the insured obtained the award

through fraud, corruption, and undue means. Medina v. Found. Reserve Ins. Co., 1997-NMSC-027, 123 N.M. 380, 940 P.2d 1175.

Failure to postpone. — Because the appellant was prejudiced by the arbitrator's failure to give him proper notice of the third hearing, and because the failure to give notice was sufficient cause to require the arbitrator to postpone the hearing, the trial court erred when it failed to vacate the arbitration award pursuant to Subsection A(4) (now (a)(3)). Jaycox v. Ekeson, 115 N.M. 635, 857 P.2d 35 (1993).

Arbitrators authorized to suggest appropriate amount of punitive damages. — The arbitration panel did not exceed its powers where, in a dispute between an insured and the automobile insurance company, it suggested the appropriate amount of punitive damages to be assessed, if the proper court determined that punitive damages should be awarded. Stewart v. State Farm Mut. Auto. Ins. Co., 104 N.M. 744, 726 P.2d 1374 (1986).

Improper licensure defense waived. — Where both parties agreed to have all their disputes settled by arbitration and participated fully in the process without objection or reservation, failure to raise the issue of proper licensure under 60-13-30A NMSA 1978, when the merits of the dispute were heard before the arbitration board, waived the issue as a defense. Spaw-Glass Constr. Servs., Inc. v. Vista De Santa Fe, Inc., 114 N.M. 557, 844 P.2d 807 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution § 234 et seq.

Perjury as ground of attack on judgment entered upon award in arbitration, 99 A.L.R. 1202.

Right of arbitrator to consider or to base his decision upon matters other than those involved in the legal principles applicable to the questions at issue between the parties, 112 A.L.R. 873.

Right of arbitrators to act on their own knowledge of facts, or factors relevant to questions submitted to them, in absence of evidence in that regard, 154 A.L.R. 1210.

Time and jurisdiction for review, reopening, modification or reinstatement of award or agreement, 165 A.L.R. 9

Arbitrator's viewing or visiting premises or property alone as misconduct justifying vacation of award, 27 A.L.R.2d 1160.

Arbitrator's consultation with outsider or outsiders as misconduct justifying vacation of award, 47 A.L.R.2d 1362.

Disqualification of arbitrator by court or stay of arbitration proceedings prior to award, on ground of interest, bias, prejudice, collusion or fraud of arbitrators, 65 A.L.R.2d 755.

Time for impeaching arbitration award, 85 A.L.R.2d 779.

Construction and effect of contractual or statutory provisions fixing time within which arbitration award must be made, 56 A.L.R.3d 815.

What constitutes corruption, fraud, or undue means in obtaining arbitration award justifying avoidance of award under state law, 22 A.L.R.4th 366.

Participation in arbitration proceedings as waiver to objections to arbitrability under state law, 56 A.L.R.5th 757.

Setting aside arbitration award on ground of interest or bias of arbitrators - insurance appraisals or arbitrations, 63 A.L.R.5th 675.

Setting aside arbitration award on ground of interest or bias of arbitrators - torts, 64 A.L.R.5th 475.

Setting aside arbitration award on ground of interest or bias of arbitrator - labor disputes, 66 A.L.R.5th 611.

Setting aside arbitration award on ground of interest or bias of arbitrators - commercial, business, or real estate transactions, 67 A.L.R.5th 179.

Vacating on public policy grounds arbitration awards reinstating discharged employees – state cases, 112 A.L.R.5th 263, §§ 17-36.

Construction and application of § 10(a)(4) of Federal Arbitration Act (9 USCS § 10(a)(4)) providing for vacating of arbitration awards where arbitrators exceed or imperfectly execute powers, 136 A.L.R. Fed. 183.

Construction and application of § 10 (a)(1)-(3) of Federal Arbitration Act (9 USCS § 10 (a)(1)-(3)) providing for vacating of arbitration awards where award procured by fraud, corruption, or undue means, where arbitrators evidence partiality or corruption and where arbitrators engage in particular acts of misbehavior, 141 A.L.R. Fed. 1

Vacating on public policy grounds arbitration awards reinstating discharged employees, 142 A.L.R. Fed. 387.

Refusal to enforce foreign arbitration awards on public policy grounds, 144 A.L.R. Fed. 481.

Vacating arbitration awards as contrary to National Labor Relations Act, 147 A.L.R. Fed. 77.

6 C.J.S. Arbitration § 150 et seq.

44-7A-25. Modification or correction of award.

(a) Upon motion made within ninety days after the movant receives notice of the award pursuant to Section 20 [44-7A-20 NMSA 1978] or within ninety days after the movant receives notice of a modified or corrected award pursuant to Section 21 [44-7A-21 NMSA 1978], the court shall modify or correct the award if:

(1) there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property referred to in the award;

(2) the arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or

(3) the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(b) If a motion made under Subsection (a) is granted, the court shall modify or correct and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award. A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award.

History: Laws 2001, ch. 227, § 25.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Provisions exclusive. — Section 44-7-12 NMSA 1978 (now Section 44-7A-24 NMSA 1978) and this section of the act establish the statutory grounds for vacating, modifying, or correcting an award. In the absence of any of these statutory grounds, the court must confirm an award submitted for review. Fernandez v. Farmers Ins. Co., 115 N.M. 622, 857 P.2d 22 (1993).

Findings required as to offset against proceeds already received. — Trial court erred in confirming arbitration award without clarification from arbitrators whether offsets for settlement proceeds already received were included in the award calculations. Casias v. Dairyland Ins. Co., 1999-NMCA-046, 126 N.M. 772, 975 P.2d 385, cert. denied, 127 N.M. 389, 981 P.2d 1207.

Award amended for other purposes void. — An amended award for purposes other than those specified in Subsection A (now Subsection (a)) is void and of no effect. Chaco Energy Co. v. Thercol Energy Co., 97 N.M. 127, 637 P.2d 558 (1981).

Scope of review. — It is not the function of the court to hear the case de novo and consider the evidence presented to the arbitrators, but rather to conduct an evidentiary hearing and enter findings of fact and conclusions of law upon each issue raised in the application to vacate or modify the award. Melton v. Lyon, 108 N.M. 420, 773 P.2d 732 (1989).

Once an arbitration award is entered, the finality of arbitration weighs heavily in its favor and cannot be upset except under exceptional circumstances. Melton v. Lyon, 108 N.M. 420, 773 P.2d 732 (1989).

Errors of law and fact. — The district court does not have the authority to review arbitration awards for errors as to the law or the facts; if the award is fairly and honestly made and if it is within the scope of the submission, the award is a final and conclusive resolution of the parties' dispute. Fernandez v. Farmers Ins. Co., 115 N.M. 622, 857 P.2d 22 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution § 234 et seq.

Time and jurisdiction for review, reopening, modification or reinstatement of award or agreement, 165 A.L.R. 9

6 C.J.S. Arbitration § 168.

44-7A-26. Judgment on award; attorney's fees and litigation expenses.

(a) Upon granting an order confirming, vacating without directing a rehearing, modifying or correcting an award, the court shall enter a judgment in conformity therewith. The judgment may be recorded, docketed and enforced as any other judgment in a civil action.

(b) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(c) On application of a prevailing party to a contested judicial proceeding under Section 23, 24 or 25 [44-7A-23, 44-7A-24, or 44-7A-25 NMSA 1978], the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying or correcting an award.

History: Laws 2001, ch. 227, § 26.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution § 227 et seq.

Enforcement of award upon submission of subject-matter of pending action, to arbitration, by judgment in same action, 42 A.L.R. 736.

Extraterritorial enforcement of arbitral award, 73 A.L.R. 1460.

6 C.J.S. Arbitration § 145 et seq.

44-7A-27. Jurisdiction.

(a) A court of this state having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this state confers exclusive jurisdiction on the court to enter judgment on an award under the Uniform Arbitration Act [44-7A-1 to 44-7A-32 NMSA 1978].

History: Laws 2001, ch. 227, § 27.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

No power to consolidate arbitration. — While this section gives New Mexico courts jurisdiction to enforce contracts to arbitrate, no express provision in the act confers on courts the power to consolidate arbitration. Pueblo of Laguna v. Cillessen & Son, 101 N.M. 341, 682 P.2d 197 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution §§ 91, 118, 252.

6 C.J.S. Arbitration § 40.

44-7A-28. Venue.

A motion pursuant to Section 6 [44-7A-6 NMSA 1978] must be made in the court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the county in which it was held. Otherwise, the motion may be made in the court of any county in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this state, in the court of any county in this state. All subsequent motions must be made in the court hearing the initial motion unless the court otherwise directs.

History: Laws 2001, ch. 227, § 28.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution §§ 118, 252.

44-7A-29. Appeals.

(a) An appeal may be taken from:

(1) an order denying a motion to compel arbitration;

(2) an order granting a motion to stay arbitration;

(3) an order confirming or denying confirmation of an award;

(4) an order modifying or correcting an award;

(5) an order vacating an award without directing a rehearing; or

(6) a final judgment entered pursuant to the Uniform Arbitration Act [44-7A-1 NMSA 1978].

(b) An appeal under this section must be taken as from an order or a judgment in a civil action.

History: Laws 2001, ch. 227, § 29.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The

Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Cross references. — As to appeals generally, see Rules 12-201 to 12-216 NMRA.

Untimely appeal. — Where, in an arbitration between a construction company and a hotel owner, the arbitrator determined an award in favor of the construction company which the hotel owner paid in full, including the award of attorney fees; almost one year later, in response to the district court's inquiry about the status of the arbitration, the construction company asked the district court to confirm the award and the hotel owner asked the district court to review the award of attorney fees; the district court confirmed the arbitration award, with the exception of the award of attorney fees, and remanded the question of attorney fees to the arbitrator for review; and the hotel owner never contested the arbitrator's award within the statutory deadlines for doing so, the hotel owner forfeited any right it might have had to contest the award in district court because, although the order of remand was appealable, as both an order confirming the award and denying the construction company's motion to confirm the award of attorney fees, the hotel owner failed to use the statutory remedies to challenge the award of attorney fees for almost a year. Journeyman Constr., LP v. Premier Hospitality II, 2013-NMCA-019, 293 P.3d 950.

Record on appeal to contain evidence of claims regarding vacation of award. — Where a party claims that the trial court should vacate the award because the arbitrator allegedly evidenced partiality and exceeded his powers, and the trial court judge reviews the record of the arbitration proceedings, but his findings do not indicate whether the record contains substantial evidence supporting or negating such claims, nor is the record of the arbitration proceedings made a part of the record for appeal, the case will be remanded to the district court to determine whether the arbitration record supports confirmation, or, in the alternative, vacation or modification of the award. Daniels Ins. Agency, Inc. v. Jordan, 99 N.M. 297, 657 P.2d 624 (1982).

Appellee may argue any grounds for affirmance. — An appellee who does not claim that the trial court erred in vacating an arbitration award has no duty to preserve that issue on appeal. It may argue any grounds for affirmance on appeal and the appellate court will uphold the trial court's decision if it is legally mandated, regardless of whether the trial court's rationale was wrong. Bruch v. CNA Ins. Co., 117 N.M. 211, 870 P.2d 749 (1994), overruled on other grounds, Padilla v. State Farm Mut. Auto. Ins. Co., 2003-NMSC-011, 133 N.M. 661, 68 P.3d 901.

Standard of review. — When reviewing whether the district court correctly confirmed an arbitration award, the appellate court determines whether substantial evidence in the record supports the district court's findings of fact and whether the court correctly applied the law to the facts when making its conclusions of law. Substantial evidence is relevant evidence that a reasonable mind might accept as sufficient to support a conclusion. When determining whether a finding of fact is supported by substantial evidence, the appellate court reviews the evidence in the light most favorable to uphold

the finding and indulge all reasonable inferences in support of the district court's decision. Town of Silver City v. Garcia, 115 N.M. 628, 857 P.2d 28 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Appealability of order or decree compelling or refusing to compel arbitration, 94 A.L.R.2d 1071, 6 A.L.R.4th 652.

Appealability of judgment confirming or setting aside arbitration award, 7 A.L.R.3d 608.

Appealability of state court's order of decree compelling or refusing to compel arbitration, 6 A.L.R.4th 652.

Uninsured and underinsured motorist coverage: enforceability of policy provision limiting appeals from arbitration, 23 A.L.R.5th 801.

44-7A-30. Uniformity of application and construction.

In applying and construing the Uniform Arbitration Act [44-7A-1 to 44-7A-32 NMSA 1978], consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

History: Laws 2001, ch. 227, § 30.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

44-7A-31. Relationship to electronic signatures in global and national commerce act.

The provisions of the Uniform Arbitration Act [44-7A-1 NMSA 1978] governing the legal effect, validity and enforceability of electronic records or electronic signatures and of contracts performed with the use of such records or signatures conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act.

History: Laws 2001, ch. 227, § 31.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Cross references. — For Section 102 of the Electronic Signatures in Global and National Commerce Act, *see* 15 USCS § 7002.

44-7A-32. Saving clause.

The Uniform Arbitration Act [44-7A-1 NMSA 1978] does not affect an action or proceeding commenced or right accrued before that act takes effect, subject to Section 3 [44-7A-3 NMSA 1978] of that act.

History: Laws 2001, ch. 227, § 32.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

ARTICLE 7B
Mediation Procedures Act

44-7B-1. Short title.

This act [Chapter 44, Article 7B NMSA 1978] may be cited as the "Mediation Procedures Act".

History: Laws 2007, ch. 11, § 1.

ANNOTATIONS

Effective dates. — Laws 2007, ch, 11, § 7 makes the act effective on July 1, 2007.

44-7B-2. Definitions.

As used in the Mediation Procedures Act [44-7B-1 NMSA 1978]:

A. "mediation" means a process in which a mediator:

(1) facilitates communication and negotiation between mediation parties to assist them in reaching an agreement regarding their dispute; or

(2) promotes reconciliation, settlement or understanding between and among parties;

B. "mediation communication" means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing or reconvening a mediation or retaining a mediator;

C. "mediation party" means a person who participates in a mediation and whose agreement is necessary to resolve the dispute;

D. "mediation program" means a program that provides mediation services and is created or administered by a court or court agency, a government or governmental subdivision, agency or instrumentality of this state or a tribal court, government or agency;

E. "mediator" means an individual who:

(1) holds the individual's self out as a mediator and who conducts a mediation;

(2) the mediation parties agree to use as a mediator and who conducts a mediation;

(3) is designated by a mediation program as a mediator and who conducts a mediation; or

(4) is an observer who is permitted by the mediation parties to watch and listen to the mediation for educational or other administrative purposes;

F. "nonparty participant" means a person, other than a mediation party or mediator, who participates in, is present during the mediation or is a mediation program administrator, including a person consulted by a mediation party to assist the mediation party with evaluating, considering or generating offers of settlement;

G. "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or governmental subdivision, agency or instrumentality, public corporation or any other legal or commercial entity;

H. "proceeding" means:

(1) arbitration or a judicial, administrative or other adjudicative process, including related pre-hearing and post-hearing motions, conferences and discovery; or

(2) a legislative hearing or similar process;

I. "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and

J. "sign" means:

(1) to execute or adopt a tangible symbol with the present intent to authenticate a record or to ratify the agreement set forth in the record; or

(2) to attach or logically associate an electronic symbol, sound or process to or with a record with the present intent to authenticate a record or to ratify the agreement set forth in the record.

History: Laws 2007, ch. 11, § 2.

ANNOTATIONS

Effective dates. — Laws 2007, ch, 11, § 7 makes the act effective on July 1, 2007.

Nonparty participant. — Where two parties made separate loans to another party to the litigation; the loans were secured by stock in the defendant corporation; at a settlement conference, the lender parties agreed that they were unable to fully evaluate the settlement offer, that additional information was necessary to evaluate the settlement offer, and that they would hire an expert to perform a valuation of the defendant corporation; the appraiser's engagement letter stated that the appraiser's valuation report was prepared for purposes of mediation; a second settlement conference was rescheduled to allow the appraiser to complete the valuation report; the mediator did not request the valuation; and the appraiser was not present at and did not participate in the settlement conferences, the appraiser was a nonparty participant in the mediation. Warner v. Calvert, 2011-NMCA-028, 150 N.M. 333, 258 P.3d 1125.

44-7B-3. Scope.

A. Except as otherwise provided in Subsection B of this section, the Mediation Procedures Act [44-7B-1 NMSA 1978] applies to all mediators, nonparty participants, mediation parties and a mediation in which:

(1) the mediation parties are required to mediate by statute or court or administrative agency rule or are referred to mediation by a court, administrative agency or arbitrator; or

(2) the mediation parties and the mediator agree to mediate and the agreement to mediate is evidenced by a record that is signed by the mediation parties.

B. The Mediation Procedures Act does not apply to a mediation:

(1) relating to the establishment, negotiation, administration or termination of a collective bargaining relationship;

(2) relating to a dispute that is pending pursuant to or is part of the processes established by a collective bargaining agreement, except that the Mediation Procedures Act applies to a mediation arising out of a dispute that has been filed with an administrative agency or court;

(3) conducted by a judge who might make a ruling on the case; or

(4) agreed to in writing by the mediation parties and the mediator prior to the mediation not to be covered by the Mediation Procedures Act, declared in writing by a mediation program prior to the mediation or declared in writing by a court or court agency, a government or governmental subdivision, agency or instrumentality of this state or a tribal court, government or agency prior to the mediation not to be covered by the Mediation Procedures Act.

History: Laws 2007, ch. 11, § 3.

ANNOTATIONS

Effective dates. — Laws 2007, ch, 11, § 7 makes the act effective on July 1, 2007.

44-7B-4. Confidentiality.

Except as otherwise provided in the Mediation Procedures Act [44-7B-1 NMSA 1978] or by applicable judicial court rules, all mediation communications are confidential, and not subject to disclosure and shall not be used as evidence in any proceeding.

History: Laws 2007, ch. 11, § 4.

ANNOTATIONS

Effective dates. — Laws 2007, ch, 11, § 7 makes the act effective on July 1, 2007.

Report prepared for use in mediation was a confidential mediation communication. — Where two parties made separate loans to another party to the litigation; the loans were secured by stock in the defendant corporation; at a settlement conference, the lender parties agreed that they were unable to fully evaluate the settlement offer, that additional information was necessary to settlement evaluation, and that they would hire an expert to perform a valuation of the defendant corporation; the appraiser's engagement letter and valuation report stated that the report was prepared for purposes of mediation and was restricted to internal use by the parties' tax and legal advisors; and a second settlement conference was rescheduled to allow the appraiser to complete the valuation report, the valuation report was a confidential mediation communication that could not be disclosed or used at trial. Warner v. Calvert, 2011-NMCA-028, 150 N.M. 333, 258 P.3d 1125.

Nonparty participant may be a witness at trial. — Where two of the parties made separate loans to another party to the litigation; the loans were secured by stock in the defendant corporation; at a settlement conference, the lender parties agreed to hire an expert to prepare a valuation of the defendant corporation to assist them evaluate a settlement offer; the appraiser's engagement letter provided that additional fees would be required if the appraiser testified at trial; and the valuation report was a confidential mediation communication, the district court did not abuse its discretion in appointing the appraiser as a Rule 11-706 NMRA expert witness and although the appraiser was prohibited from testifying about the valuation report, the appraiser could testify about documents underling the valuation report and could prepare a new valuation report. Warner v. Calvert, 2011-NMCA-028, 150 N.M. 333, 258 P.3d 1125.

44-7B-5. Exceptions; admissibility; discovery.

A. Mediation communications are not confidential pursuant to the Mediation Procedures Act [44-7B-1 NMSA 1978] if they:

(1) are contained in an agreement reached by the mediation parties during a mediation, including an agreement to mediate, and the agreement is evidenced by a record signed by the mediation parties, except when parts of the agreement are designated by the mediation parties to be confidential or are confidential as otherwise provided by law;

(2) are communications that all mediation parties agree may be disclosed, as evidenced by a record signed by all mediation parties prior to or at the mediation;

(3) threaten or lead to actual violence in the mediation;

(4) reveal the intent of a mediation party to commit a felony or inflict bodily harm to the mediation party's self or another person;

(5) disprove a felony charge;

(6) are required by law to be made public or otherwise disclosed;

(7) relate to abuse, neglect or criminal activity that is not the subject of the mediation;

(8) are sought or offered to disprove a claim or complaint of professional misconduct or malpractice based on conduct during a mediation and filed against a mediation party or nonparty participant;

(9) relate to the administrative facts of the mediation, including:

(a) whether the mediation parties were referred to mediation;

(b) whether a mediation occurred or has terminated;

(c) the date, time and place of a mediation;

(d) the persons in attendance at a mediation; and

(e) whether a mediator received payment for the mediation; or

(10) relate to whether the parties reached a binding and enforceable settlement in the mediation.

B. Mediation communications may be disclosed if a court, after hearing in camera and for good cause shown, orders disclosure of evidence that is sought to be offered and is not otherwise available in an action on an agreement arising out of a mediation evidenced by a record. Nothing in this subsection shall require disclosure by a mediator of any matter related to mediation communications.

C. Mediators shall not be required to make disclosure, either through discovery or testimony at trial or otherwise, of any matter related to mediation communications, except:

(1) pursuant to Paragraphs (3) through (10) of Subsection A and Paragraph (3) of Subsection D of this section; and

(2) to prove or disprove a claim of mediator misconduct or malpractice filed against a mediator.

D. Nothing in the Mediation Procedures Act shall prevent:

(1) the discovery or admissibility of any evidence that is otherwise discoverable or admissible, merely because the evidence was presented during a mediation;

(2) the gathering of information for research or educational purposes or for the purpose of evaluating or monitoring the performance of a mediator; provided that the mediation parties or the specific circumstances of the dispute of the mediation parties are not identified or identifiable;

(3) a court or court agency, a government or governmental subdivision, agency or instrumentality of this state or a tribal court, government or agency, when conducting a mediation program under its auspices, from ordering prior to the mediation that different or additional rules of confidentiality shall apply to the mediation; or

(4) mediation parties from agreeing in writing to additional or different confidentiality protections prior to the mediation, subject to Paragraphs (3) through (10) of Subsection A and Subsection C of this section.

History: Laws 2007, ch. 11, § 5.

ANNOTATIONS

Effective dates. — Laws 2007, ch, 11, § 7 makes the act effective on July 1, 2007.

44-7B-6. Effect of agreement.

A. If the mediation parties reach a settlement agreement evidenced by a record signed by the mediation parties, the agreement is enforceable in the same manner as any other written contract. The agreement shall not affect any outstanding court order unless the terms of the agreement are incorporated into a subsequent order.

B. A court, administrative agency or arbitrator, in its discretion, may incorporate the terms of the agreement in the order or other document disposing of the matter.

History: Laws 2007, ch. 11, § 6.

ANNOTATIONS

Effective dates. — Laws 2007, ch, 11, § 7 makes the act effective on July 1, 2007.

ARTICLE 8
Receivership Act

44-8-1. Short title.

This act [44-8-1 to 44-8-10 NMSA 1978] may be cited as the "Receivership Act".

History: Laws 1995, ch. 81, § 1.

44-8-2. Purpose.

The purpose of the Receivership Act [44-8-1 NMSA 1978] is to provide a framework for the creation and administration of receiverships.

History: Laws 1995, ch. 81, § 2.

44-8-3. Definitions.

As used in the Receivership Act [44-8-1 NMSA 1978]:

A. "applicant" means an interested person who seeks the appointment of a receiver;

B. "business entity" means a sole proprietorship, a profit or nonprofit corporation, a general or limited partnership, business trust, joint venture or other enterprise composed of one or more persons or entities;

C. "interested person" means any secured or unsecured creditor, a shareholder of a corporation, a general or limited partner of a partnership or a person jointly owning or interested in a receivership estate; and

D. "receivership estate" means tangible and intangible property, its proceeds, profits, substitutions, additions, fixtures and accretions for which a receiver is sought.

History: Laws 1995, ch. 81, § 3.

ANNOTATIONS

Spouse in a divorce action was an interested party. — Where the injured spouse was severely injured when the driving spouse attempted to pass on a blind curve and collided head-on with another vehicle; the injured spouse sued the driving spouse for personal injuries and the driving spouse's insurer for bad faith; during the pendency of the personal injury action, the driving spouse filed a divorce action against the injured spouse; and at the injured spouse's request and because of the driving spouse's Alzheimer's disease, the district court appointed a receiver to manage the driving spouse's bad faith claim against the insurer, the injured spouse had a sufficient interest to request the appointment of a receiver because the injured spouse had an interest in preserving community property and separate property assets that could be used in arriving at a final settlement of the marital dispute. Dydek v. Dydek, 2012-NMCA-088, 288 P.3d 872.

44-8-4. Grounds for appointing a receiver.

A. Upon application to a district court, the district court shall appoint a receiver in an action by a mortgagee or secured party or in any other action based upon a contract or other written agreement, where such mortgage, security agreement, contract or other written agreement provides for the appointment of a receiver.

B. Upon application to a district court, the district court may appoint a receiver:

(1) when specific statutory provisions authorize the appointment of a receiver;

(2) in an action between or among persons owning or claiming an interest in the receivership estate;

(3) in actions where receivers have customarily been appointed by courts of law or equity;

(4) when a receiver has been appointed for a business entity or other person by a court of competent jurisdiction in another state, and that receiver seeks to collect, take possession or manage assets of the receivership estate located in New Mexico; or

(5) in any other case where, in the discretion of the district court, just cause exists and irreparable harm may result from failure to appoint a receiver.

History: Laws 1995, ch. 81, § 4.

44-8-5. Application for appointment of a receiver.

A. An applicant may apply to the district court for the appointment of a receiver by motion in an action already pending or by a separate petition or complaint.

B. An application for the appointment of a receiver shall be verified and shall contain:

(1) a description of the receivership estate, including the estimated gross monthly income if known, for which the applicant seeks a receiver;

(2) the location of the receivership estate;

(3) a description of the applicant's interest in the receivership estate;

(4) a statement showing that venue in the district court is proper;

(5) a statement of the grounds for the appointment of a receiver; and

(6) a nomination of the proposed receiver.

C. An ex parte hearing to appoint a receiver may be held without written or oral notice to the adverse party or his attorney only if:

(1) it clearly appears from specific facts shown by affidavit or by the verified application that immediate and irreparable injury, loss or damage will result to the applicant or others before the adverse party's attorney can be heard in opposition; and

(2) the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the attorney's claim that notice should not be required.

D. Every application, proceeding and order for appointment of a receiver granted without notice shall comply with the Rules of Civil Procedure for the District Courts of New Mexico pertaining to temporary restraining orders and appointment of receivers ex parte.

History: Laws 1995, ch. 81, § 5; 1996, ch. 35, § 10.

ANNOTATIONS

44-8-6. Qualifications for receivers.

A receiver shall meet the following qualifications:

A. the person must be at least eighteen years of age or a corporation or other business entity in good standing authorized to do business in New Mexico;

B. the person must not be otherwise disqualified under applicable state or federal law to administer the receivership estate;

C. before entering on his duties as receiver, the receiver shall sign and file a consent to act as receiver; and

D. upon request and a showing of good cause by an interested party, the district court may require the receiver to post a bond unless the mortgage, security agreement, contract or other written agreement dispenses with the posting of bond. The amount of the bond shall be as ordered by the court.

History: Laws 1995, ch. 81, § 6.

44-8-7. Powers and duties of receivers.

Unless otherwise ordered by the district court, a person who acts as a receiver shall:

A. prepare an inventory of the receivership estate within thirty days of appointment and file that inventory with the district court;

B. collect and manage the receivership estate in a reasonable and prudent manner;

C. file monthly operating reports with the district court and provide copies to all parties who have entered an appearance and allow such parties reasonable access to the books and records of the receivership;

D. enter into contracts reasonably necessary to operate, maintain and preserve the receivership estate;

E. take possession of all available books, records and other documents related to the receivership estate;

F. lease assets of the receivership estate in accordance with the powers and limitations contained in the original order of appointment;

G. bring and defend actions in his capacity as receiver to maintain and preserve the receivership estate;

H. subject to prior order of the district court, engage and retain attorneys, accountants, brokers or any other persons and pay their compensation or fees, sell or mortgage property of the receivership estate, borrow money for the receivership estate, make distributions of receivership proceeds to any party or pay compensation to the receiver; and

I. exercise any other powers expressly granted by statute or an order of the district court.

History: Laws 1995, ch. 81, § 7.

ANNOTATIONS

Duty to account. — In a divorce proceeding, where the court ordered the wife to manage, oversee and liquidate the parties' assets and to provide monthly accountings to the husband of assets sold and debts paid; the court subsequently appointed a special master to review and resolve issues concerning the liquidation of family businesses; the court subsequently ordered the special master to complete the liquidation of the estate; and the wife continued to be actively involved in the liquidation of the community assets after the special master was appointed, the wife was not relieved of her responsibility to account. Muse v. Muse, 2009-NMCA-003, 145 N.M. 451, 200 P.3d 104.

44-8-8. Compensation.

A receiver and an attorney, accountant, broker and other person duly engaged and retained by the receiver shall be entitled to receive reasonable compensation, to be paid from the receivership estate, in a sum to be fixed or approved by the district court, for services rendered to the receivership estate.

History: Laws 1995, ch. 81, § 8.

44-8-9. Removal, death, resignation, substitution and discharge of receiver; termination of receivership.

A. Upon notice and hearing, a receiver may be removed either upon application by an interested person or upon the district court's own motion.

B. The death, resignation or substitution of a receiver, the expiration of a receiver's term of appointment or the dismissal of the action in which a receiver was appointed shall not have the effect of terminating the receivership.

C. A receiver may not resign except by leave of the district court. Leave shall be sought by motion and hearing unless the agreement of all parties obviates the need for a hearing. Leave may provide for the discharge of a receiver, and leave and discharge may be conditioned upon:

(1) the substitution of another receiver;

(2) the preparation and filing of a receiver's report;

(3) the preparation and filing of an accounting;

(4) the delivery of receivership property, accounts and books to a successor or to a person appointed by the district court;

(5) the consent of all interested persons;

(6) the termination of the receivership;

(7) the conclusion of litigation to which a receiver is party; or

(8) such other terms as the district court may order.

D. In the event of the death, resignation or removal of a receiver, the district court shall appoint a successor receiver to oversee a receivership estate. A receiver so appointed succeeds to the powers of his predecessor.

E. Upon disposition of the action concerning the receivership estate, the district court shall enter an order that discharges the receiver from his duties and releases him from any claim or demand of any interested person. Upon the termination of the receiver's duties, the receiver shall prepare and file a final report and account of the receivership and serve it upon all parties who have entered an appearance. Any objections to the receiver's final account and report and claims to surcharge must be filed within ten days of service. Upon settlement of the receiver's final account and report, the district court shall enter an order discharging the receiver from all further duties, releasing him from any claim or demand of any interested person and exonerating any bond that the receiver has been required to post in connection with the receivership.

History: Laws 1995, ch. 81, § 9.

44-8-10. Appeal and stay of appointment of a receiver.

If an appeal is taken from a district court from a judgment or an order appointing a receiver, perfecting of an appeal from such judgment or order shall not stay enforcement of the judgment or order unless a bond, in a sum fixed by the district court, is given and posted on condition that if the judgment or order is affirmed on the appeal,

or if the appeal is withdrawn or dismissed, the appellant will pay all costs and damages that the respondent may sustain by reason of the stay in the enforcement of the judgment or order.

History: Laws 1995, ch. 81, § 10.

ANNOTATIONS

Severability. — Laws 1995, ch. 81, § 12 provides for the severability of the act if any part or application thereof is held invalid.

ARTICLE 9
Fraud Against Taxpayers Act

44-9-1. Short title.

This act [44-9-1 to 44-9-14 NMSA 1978] may be cited as the "Fraud Against Taxpayers Act".

History: Laws 2007, ch. 40, § 1.

ANNOTATIONS

Cross references. — For the New Mexico finance authority, *see* 6-21-4 NMSA 1978.

For the mortgage finance authority, *see* 58-18-4 NMSA 1978.

For the New Mexico lottery authority, *see* 6-24-5 NMSA 1978.

Effective dates. — Laws 2007, ch. 40, § 16 makes the act effective July 1, 2007.

Severability. — Laws 2007, ch. 40, § 15 provides for the severability of the Fraud Against Taxpayers Act if any part or application thereof is held invalid.

44-9-2. Definitions.

As used in the Fraud Against Taxpayers Act [44-9-1 NMSA 1978]:

A. "claim" means a request or demand for money, property or services when all or a portion of the money, property or services requested or demanded issues from or is provided or reimbursed by the state;

B. "employer" includes an individual, corporation, firm, association, business, partnership, organization, trust and the state and any of its agencies, institutions or political subdivisions;

C. "knowingly" means that a person, with respect to information, acts:

(1) with actual knowledge of the truth or falsity of the information;

(2) in deliberate ignorance of the truth or falsity of the information; or

(3) in reckless disregard of the truth or falsity of the information;

D. "person" means an individual, corporation, firm, association, organization, trust, business, partnership, limited liability company, joint venture or any legal or commercial entity; and

E. "state" means the state of New Mexico or any of its branches, agencies, departments, boards, commissions, officers, institutions or instrumentalities, including the New Mexico finance authority, the New Mexico mortgage finance authority and the New Mexico lottery authority.

History: Laws 2007, ch. 40, § 2.

ANNOTATIONS

Cross references. — For the New Mexico finance authority, *see* 6-21-4 NMSA 1978.

For the mortgage finance authority, *see* 58-18-4 NMSA 1978.

For the New Mexico lottery authority, *see* 6-24-5 NMSA 1978.

Effective dates. — Laws 2007, ch. 40, § 16 makes the act effective July 1, 2007.

Severability. — Laws 2007, ch. 40, § 15 provides for the severability of the Fraud Against Taxpayers Act if any part or application thereof is held invalid.

44-9-3. False claims; liability; penalties; exception.

A. A person shall not:

(1) knowingly present, or cause to be presented, to an employee, officer or agent of the state or to a contractor, grantee or other recipient of state funds a false or fraudulent claim for payment or approval;

(2) knowingly make or use, or cause to be made or used, a false, misleading or fraudulent record or statement to obtain or support the approval of or the payment on a false or fraudulent claim;

(3) conspire to defraud the state by obtaining approval or payment on a false or fraudulent claim;

(4) conspire to make, use or cause to be made or used, a false, misleading or fraudulent record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the state;

(5) when in possession, custody or control of property or money used or to be used by the state, knowingly deliver or cause to be delivered less property or money than the amount indicated on a certificate or receipt;

(6) when authorized to make or deliver a document certifying receipt of property used or to be used by the state, knowingly make or deliver a receipt that falsely represents a material characteristic of the property;

(7) knowingly buy, or receive as a pledge of an obligation or debt, public property from any person that may not lawfully sell or pledge the property;

(8) knowingly make or use, or cause to be made or used, a false, misleading or fraudulent record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the state; or

(9) as a beneficiary of an inadvertent submission of a false claim and having subsequently discovered the falsity of the claim, fail to disclose the false claim to the state within a reasonable time after discovery.

B. Proof of specific intent to defraud is not required for a violation of Subsection A of this section.

C. A person who violates Subsection A of this section shall be liable for:

(1) three times the amount of damages sustained by the state because of the violation;

(2) a civil penalty of not less than five thousand dollars ($5,000) and not more than ten thousand dollars ($10,000) for each violation;

(3) the costs of a civil action brought to recover damages or penalties; and

(4) reasonable attorney fees, including the fees of the attorney general or state agency counsel.

D. A court may assess not less than two times the amount of damages sustained by the state if the court finds all of the following:

(1) the person committing the violation furnished the attorney general with all information known to that person about the violation within thirty days after the date on which the person first obtained the information;

(2) at the time that the person furnished the attorney general with information about the violation, a criminal prosecution, civil action or administrative action had not been commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation; and

(3) the person fully cooperated with any investigation by the attorney general.

E. This section does not apply to claims, records or statements made pursuant to the provisions of Chapter 7 NMSA 1978.

History: Laws 2007, ch. 40, § 3.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 40, § 16 makes the act effective July 1, 2007.

Severability. — Laws 2007, ch. 40, § 15 provides for the severability of the Fraud Against Taxpayers Act if any part or application thereof is held invalid.

44-9-4. Investigation by the attorney general; delegation; civil action.

A. The attorney general shall diligently investigate suspected violations of Section 3 of the Fraud Against Taxpayers Act [44-9-3 NMSA 1978], and if the attorney general finds that a person has violated or is violating that section, the attorney general may bring a civil action against that person pursuant to the Fraud Against Taxpayers Act [44-9-1 NMSA 1978].

B. The attorney general may in appropriate cases delegate the authority to investigate or to bring a civil action to the state agency to which a false claim was made, and when this occurs, the state agency shall have every power conferred upon the attorney general pursuant to the Fraud Against Taxpayers Act.

History: Laws 2007, ch. 40, § 4.

ANNOTATIONS

Cross references. — For the authority of the attorney general to bring civil and criminal action, *see* 8-5-3 NMSA 1978.

Effective dates. — Laws 2007, ch. 40, § 16 makes the act effective July 1, 2007.

Severability. — Laws 2007, ch. 40, § 15 provides for the severability of the Fraud Against Taxpayers Act if any part or application thereof is held invalid.

44-9-5. Civil action by qui tam plaintiff; state may intervene.

A. A person may bring a civil action for a violation of Section 3 of the Fraud Against Taxpayers Act [44-9-3 NMSA 1978] on behalf of the person and the state. The action shall be brought in the name of the state. The person bringing the action shall be referred to as the qui tam plaintiff. Once filed, the action may be dismissed only with the written consent of the court, taking into account the best interest of the parties involved and the public purposes behind the Fraud Against Taxpayers Act [44-9-1 NMSA 1978].

B. A complaint filed by a qui tam plaintiff shall be filed in camera in district court and shall remain under seal for at least sixty days. No service shall be made on a defendant and no response is required from a defendant until the seal has been lifted and the complaint served pursuant to the rules of civil procedure.

C. On the same day as the complaint is filed, the qui tam plaintiff shall serve the attorney general with a copy of the complaint and written disclosure of substantially all material evidence and information the qui tam plaintiff possesses. The attorney general on behalf of the state may intervene and proceed with the action within sixty days after receiving the complaint and the material evidence and information. Upon a showing of good cause and reasonable diligence in the state's investigation, the state may move the court for an extension of time during which the complaint shall remain under seal.

D. Before the expiration of the sixty-day period or any extensions of time granted by the court, the attorney general shall notify the court that the state:

(1) intends to intervene and proceed with the action; in which case, the seal shall be lifted and the action shall be conducted by the attorney general on behalf of the state; or

(2) declines to take over the action; in which case, the seal shall be lifted and the qui tam plaintiff may proceed with the action.

E. When a person brings an action pursuant to this section, no person other than the attorney general on behalf of the state may intervene or bring a related action based on the facts underlying the pending action.

History: Laws 2007, ch. 40, § 5.

ANNOTATIONS

Cross references. — For the rules of civil procedure for district courts, see 1-001 NMRA.

Effective dates. — Laws 2007, ch. 40, § 16 makes the act effective July 1, 2007.

Severability. — Laws 2007, ch. 40, § 15 provides for the severability of the Fraud Against Taxpayers Act if any part or application thereof is held invalid.

Qui tam prosecutions. — For a history of qui tam prosecutions, *see* Guiterrez v. Gober, 43 N.M. 146, 87 P.3d 437 (1939).

44-9-6. Rights of the qui tam plaintiff and the state.

A. If the state proceeds with the action, it shall have the primary responsibility of prosecuting the action and shall not be bound by an act of the qui tam plaintiff. The qui tam plaintiff shall have the right to continue as a party to the action, subject to the limitations of this section.

B. The state may seek to dismiss the action for good cause notwithstanding the objections of the qui tam plaintiff if the qui tam plaintiff has been notified of the filing of the motion and the court has provided the qui tam plaintiff with an opportunity to oppose the motion and to present evidence at a hearing.

C. The state may settle the action with the defendant notwithstanding any objection by the qui tam plaintiff if the court determines, after a hearing providing the qui tam plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate and reasonable under all of the circumstances.

D. Upon a showing by the state that unrestricted participation during the course of the litigation by the qui tam plaintiff would interfere with or unduly delay the state's prosecution of the case, or would be repetitious, irrelevant or for the purpose of harassment, the court may, in its discretion, impose limitations on the qui tam plaintiff's participation, such as:

(1) limiting the number of witnesses the qui tam plaintiff may call;

(2) limiting the length of testimony of such witnesses;

(3) limiting the qui tam plaintiff's cross examination of witnesses; or

(4) otherwise limiting the qui tam plaintiff's participation in the litigation.

E. Upon a showing by a defendant that unrestricted participation during the course of litigation by the qui tam plaintiff would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the qui tam plaintiff in the litigation.

F. If the state elects not to proceed with the action, the qui tam plaintiff shall have the right to conduct the action. If the attorney general so requests, the qui tam plaintiff shall serve the attorney general with copies of all pleadings filed in the action and all deposition transcripts in the case, at the state's expense. When the qui tam plaintiff proceeds with the action, the court, without limiting the status and rights of the qui tam plaintiff, may permit the attorney general to intervene at a later date upon a showing of good cause.

G. Whether or not the state proceeds with the action, upon a showing by the attorney general on behalf of the state that certain actions of discovery by the qui tam plaintiff would interfere with the state's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than sixty days. The showing by the state shall be conducted in camera. The court may extend the sixty-day period upon a further showing in camera that the state has pursued the criminal or civil investigation or proceeding with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceeding.

H. Notwithstanding the provisions of Section 5 of the Fraud Against Taxpayers Act [44-9-5 NMSA 1978], the attorney general may elect to pursue the state's claim through any alternate remedy available to the state, including an administrative proceeding to determine a civil money penalty. If an alternate remedy is pursued, the qui tam plaintiff shall have the same rights in such a proceeding as the qui tam plaintiff would have had if the action had continued pursuant to this section. A finding of fact or conclusion of law made in the other proceeding that has become final shall be conclusive on all parties to an action under the Fraud Against Taxpayers Act [44-9-1 NMSA 1978]. For purposes of this subsection, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court, if all time for filing an appeal with respect to the finding or conclusion has expired or if the finding or conclusion is not subject to judicial review.

History: Laws 2007, ch. 40, § 6.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 40, § 16 makes the act effective July 1, 2007.

Severability. — Laws 2007, ch. 40, § 15 provides for the severability of the Fraud Against Taxpayers Act if any part or application thereof is held invalid.

44-9-7. Awards to qui tam plaintiff and the state.

A. Except as otherwise provided in this section, if the state proceeds with an action brought by a qui tam plaintiff and the state prevails in the action, the qui tam plaintiff shall receive:

(1) at least fifteen percent but not more than twenty-five percent of the proceeds of the action or settlement, depending upon the extent to which the qui tam plaintiff substantially contributed to the prosecution of the action; or

(2) no more than ten percent of the proceeds of the action or settlement if the court finds that the action was based primarily on disclosures of specific information, not provided by the qui tam plaintiff, relating to allegations or transactions in a criminal, civil, administrative or legislative hearing, proceeding, report, audit or investigation or from the news media, taking into account the significance of the information and the role of

the qui tam plaintiff in advancing the case to litigation. However, if the attorney general determines and certifies in writing that the qui tam plaintiff provided a significant contribution in advancing the case, then the qui tam plaintiff shall receive the share of proceeds set forth in Paragraph (1) of this subsection.

B. If the state does not proceed with an action brought by a qui tam plaintiff and the state prevails in the action, the qui tam plaintiff shall receive an amount that is not less than twenty-five percent or more than thirty percent of the proceeds of the action or settlement, as the court deems reasonable for collecting the civil penalty and damages.

C. Whether or not the state proceeds with an action brought by a qui tam plaintiff:

(1) if the court finds that the action was brought by a person that planned or initiated the violation of Section 3 of the Fraud Against Taxpayers Act [44-9-3 NMSA 1978] upon which the action was based, the court may reduce the share of the proceeds that the person would otherwise receive under Subsection A or B of this section, taking into account the role of the person as the qui tam plaintiff in advancing the case to litigation and any relevant circumstances pertaining to the violation; or

(2) if the person bringing the action is convicted of criminal conduct arising from that person's role in the violation of Section 3 of the Fraud Against Taxpayers Act upon which the action was based, that person shall be dismissed from the civil action and shall not receive a share of the proceeds. The dismissal shall not prejudice the right of the state to continue the action.

D. Any award to a qui tam plaintiff shall be paid out of the proceeds of the action or settlement, if any. The qui tam plaintiff shall also receive an amount for reasonable expenses incurred in the action plus reasonable attorney fees that shall be paid by the defendant.

E. The state is entitled to all proceeds collected in an action or settlement not awarded to a qui tam plaintiff. The state is also entitled to reasonable expenses incurred in the action plus reasonable attorney fees, including the fees of the attorney general or state agency counsel that shall be paid by the defendant. Proceeds and penalties collected by the state shall be deposited as follows:

(1) proceeds in the amount of the false claim paid and attorney fees and costs shall be returned to the fund or funds from which the money, property or services came;

(2) civil penalties shall be deposited in the current school fund pursuant to Article 12, Section 4 of the constitution of New Mexico; and

(3) all remaining proceeds shall be deposited as follows:

(a) one-half into a fund for the use of the attorney general in furtherance of the obligations imposed upon that office by the Fraud Against Taxpayers Act [44-9-1 NMSA 1978]; and

(b) one-half into the general fund.

History: Laws 2007, ch. 40, § 7.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 40, § 16 makes the act effective July 1, 2007.

Severability. — Laws 2007, ch. 40, § 15 provides for the severability of the Fraud Against Taxpayers Act if any part or application thereof is held invalid.

44-9-8. Award of attorney fees and costs to defendant.

If the state does not proceed with the action and the qui tam plaintiff conducts the action, the court may award a defendant reasonable attorney fees and costs if the defendant prevails and the court finds the action clearly frivolous, clearly vexatious or brought primarily for the purpose of harassment.

History: Laws 2007, ch. 40, § 8.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 40, § 16 makes the act effective July 1, 2007.

Severability. — Laws 2007, ch. 40, § 15 provides for the severability of the Fraud Against Taxpayers Act if any part or application thereof is held invalid.

44-9-9. Certain actions barred.

A. No court shall have jurisdiction over an action brought pursuant to Section 5 of the Fraud Against Taxpayers Act [44-9-5 NMSA 1978] by a present or former employee of the state unless the employee, during employment with the state and in good faith, exhausted existing internal procedures for reporting false claims and the state failed to act on the information provided within a reasonable period of time.

B. No court shall have jurisdiction over an action brought pursuant to Section 5 of the Fraud Against Taxpayers Act against an elected or appointed state official, a member of the state legislature or a member of the judiciary if the action is based on evidence or information known to the state agency to which the false claim was made or to the attorney general when the action was filed.

C. Unless the attorney general determines and certifies in writing that the action is in the interest of the state, no court shall have jurisdiction over an action brought pursuant to Section 5 of the Fraud Against Taxpayers Act when that action is based on allegations or transactions that are the subject of a criminal, civil or administrative proceeding in which the state is a party.

D. Upon motion of the attorney general, a court may, in its discretion, dismiss an action brought pursuant to Section 5 of the Fraud Against Taxpayers Act if the elements of the alleged false or fraudulent claim have been publicly disclosed in the news media or in a publicly disseminated governmental report at the time the complaint is filed.

History: Laws 2007, ch. 40, § 9.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 40, § 16 makes the act effective July 1, 2007.

Severability. — Laws 2007, ch. 40, § 15 provides for the severability of the Fraud Against Taxpayers Act if any part or application thereof is held invalid.

44-9-10. State not liable.

The state shall not be liable for expenses or fees that a qui tam plaintiff may incur in investigating or bringing an action pursuant to the Fraud Against Taxpayers Act [44-9-1 NMSA 1978].

History: Laws 2007, ch. 40, § 10.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 40, § 16 makes the act effective July 1, 2007.

Severability. — Laws 2007, ch. 40, § 15 provides for the severability of the Fraud Against Taxpayers Act if any part or application thereof is held invalid.

44-9-11. Employer interference with employee disclosure; private action for retaliation.

A. An employer shall not make, adopt or enforce a rule, regulation or policy preventing an employee from disclosing information to a government or law enforcement agency or from acting in furtherance of a fraud against taxpayers action, including investigating, initiating, testifying or assisting in an action filed or to be filed pursuant to the Fraud Against Taxpayers Act [44-9-1 NMSA 1978].

B. An employer shall not discharge, demote, suspend, threaten, harass, deny promotion to or in any other manner discriminate against an employee in the terms and

conditions of employment because of the lawful acts of the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a fraud against taxpayers action, including investigating, initiating, testifying or assisting in an action filed or to be filed pursuant to the Fraud Against Taxpayers Act.

C. An employer that violates Subsection B of this section shall be liable to the employee for all relief necessary to make the employee whole, including reinstatement with the same seniority status that the employee would have had but for the violation, two times the amount of back pay with interest on the back pay, compensation for any special damage sustained as a result of the violation and, if appropriate, punitive damages. In addition, an employer shall be required to pay the litigation costs and reasonable attorney fees of the employee. An employee may bring an action pursuant to this section in any court of competent jurisdiction.

History: Laws 2007, ch. 40, § 11.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 40, § 16 makes the act effective July 1, 2007.

Severability. — Laws 2007, ch. 40, § 15 provides for the severability of the Fraud Against Taxpayers Act if any part or application thereof is held invalid.

44-9-12. Limitation of actions; estoppel; standard of proof.

A. A civil action pursuant to the Fraud Against Taxpayers Act [44-9-1 NMSA 1978] may be brought at any time. A civil action pursuant to the Fraud Against Taxpayers Act may be brought for conduct that occurred prior to the effective date of that act, but not for conduct that occurred prior to July 1, 1987.

B. Notwithstanding any other provision of law, a final judgment rendered in a criminal proceeding charging fraud or false statement, whether upon a guilty verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of a fraud against taxpayers action where the criminal proceeding concerns the same transaction that is the subject of the fraud against taxpayers action.

C. In an action brought pursuant to the Fraud Against Taxpayers Act, the state or the qui tam plaintiff shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

History: Laws 2007, ch. 40, § 12.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 40, § 16 makes the act effective July 1, 2007.

Severability. — Laws 2007, ch. 40, § 15 provides for the severability of the Fraud Against Taxpayers Act if any part or application thereof is held invalid.

The Fraud Against Taxpayers Act is penal in nature. — The Fraud Against Taxpayers Act, Section 44-9-1 NMSA 1978 et seq., is penal in nature because the treble damages provision of the act has historically been regarded as punishment; a finding of scienter is an element of a violation of the act; the damages available to a plaintiff under the act involved promote retribution and deterrence, the traditional aims of punishment; the behavior sanctioned by the act is already considered a crime; and the penalty for a violation of the act is excessive when compared with its alternative regulatory and remedial purpose. State ex rel. Foy v. Austin Capital Mgmt. Ltd., 2013-NMCA-043, 297 P.3d 357, cert. granted, 2013-NMCERT-003.

Retroactive application the Fraud Against Taxpayers Act, Section 44-9-1 NMSA 1978 et seq., violates the ex post facto clause of the United States constitution and the New Mexico constitution because the act is punitive in nature and the qui tam component of the act created a new cause of action that is subject to the retroactivity prohibitions of the ex post facto clause. State ex rel. Foy v. Austin Capital Mgmt. Ltd., 2013-NMCA-043, 297 P.3d 357, cert. granted, 2013-NMCERT-003.

The retroactivity provision of the Fraud Against Taxpayers Act is severable. — The retroactivity provision in Subsection A of Section 44-9-12 NMSA 1978 may be severed from the Fraud Against Taxpayers Act, Section 44-9-1 NMSA 1978 et seq., so that the remainder of the act remains in full force and effect as applied prospectively. State ex rel. Foy v. Austin Capital Mgmt. Ltd., 2013-NMCA-043, 297 P.3d 357, cert. granted, 2013-NMCERT-003.

44-9-13. Joint and several liability.

Liability shall be joint and several for any act committed by two or more persons in violation of the Fraud Against Taxpayers Act [44-9-1 NMSA 1978].

History: Laws 2007, ch. 40, § 13.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 40, § 16 makes the act effective July 1, 2007.

Severability. — Laws 2007, ch. 40, § 15 provides for the severability of the Fraud Against Taxpayers Act if any part or application thereof is held invalid.

44-9-14. Remedy not exclusive.

The remedies provided for in the Fraud Against Taxpayers Act [44-9-1 NMSA 1978] are not exclusive and shall be in addition to any other remedies provided for in any other law or available under common law.

History: Laws 2007, ch. 40, § 14.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 40, § 16 makes the act effective July 1, 2007.

Severability. — Laws 2007, ch. 40, § 15 provides for the severability of the Fraud Against Taxpayers Act if any part or application thereof is held invalid.

ARTICLE 10
Uniform Unsworn Foreign Declarations Act

44-10-1. Short title.

Sections 1 through 8 of this act may be cited as the "Uniform Unsworn Foreign Declarations Act".

History: Laws 2009, ch. 78, § 1.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 78, § 10 made the act effective July 1, 2009.

44-10-2. Definitions.

As used in the Uniform Unsworn Foreign Declarations Act:

A. "boundaries of the United States" means the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands and any territory or insular possession subject to the jurisdiction of the United States;

B. "law" includes the federal or a state constitution, a federal or state statute, a judicial decision or order, a rule of court, an executive order and an administrative rule, regulation or order;

C. "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

D. "sign" means, with present intent to authenticate or adopt a record:

(1) to execute or adopt a tangible symbol; or

(2) to attach to or logically associate with the record an electronic symbol, sound or process.

E. "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States;

F. "sworn declaration" means a declaration in a signed record given under oath. The term includes a sworn statement, verification, certificate and affidavit; and

G. "unsworn declaration" means a declaration in a signed record that is not given under oath, but is given under penalty of perjury.

History: Laws 2009, ch. 78, § 2.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 78, § 10 made the act effective July 1, 2009.

44-10-3. Applicability.

The Uniform Unsworn Foreign Declarations Act applies to an unsworn declaration by a declarant who at the time of making the declaration is physically located outside the boundaries of the United States whether or not the location is subject to the jurisdiction of the United States. The Uniform Unsworn Foreign Declarations Act does not apply to a declaration by a declarant who is physically located on property that is within the boundaries of the United States and subject to the jurisdiction of another country or a federally recognized Indian tribe.

History: Laws 2009, ch. 78, § 3.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 78, § 10 made the act effective July 1, 2009.

44-10-4. Validity of unsworn declaration.

A. Except as otherwise provided in Subsection B of this section, if a law of New Mexico requires or permits use of a sworn declaration, an unsworn declaration meeting the requirements of the Uniform Unsworn Foreign Declarations Act has the same effect as a sworn declaration.

B. The Uniform Unsworn Foreign Declarations Act does not apply to:

(1) a deposition;

(2) an oath of office;

(3) an oath required to be given before a specified official other than a notary public;

(4) a declaration to be recorded in records affecting real property pursuant to Section 14-9-1 or 14-9-7 NMSA 1978; or

(5) an oath required for self-proved wills by Section 45-2-504 NMSA 1978.

History: Laws 2009, ch. 78, § 4.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 78, § 10 made the act effective July 1, 2009.

44-10-5. Required medium.

If a law of New Mexico requires that a sworn declaration be presented in a particular medium, an unsworn declaration shall be presented in that medium.

History: Laws 2009, ch. 78, § 5.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 78, § 10 made the act effective July 1, 2009.

44-10-6. Form of unsworn declaration.

An unsworn declaration pursuant to the Uniform Unsworn Foreign Declarations Act shall be in substantially the following form:

"I declare under penalty of perjury under the law of New Mexico that the foregoing is true and correct and that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands and any territory or insular possession subject to the jurisdiction of the United States.

Executed on the _____ day of _____, _____, at

(date) (month) (year)

,

(city or other location, and state)

_____.

(country)

_____
(printed name)

_____
(signature)".

History: Laws 2009, ch. 78, § 6.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 78, § 10 made the act effective July 1, 2009.

44-10-7. Uniformity of application and construction.

In applying and construing the Uniform Unsworn Foreign Declarations Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

History: Laws 2009, ch. 78, § 7.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 78, § 10 made the act effective July 1, 2009.

44-10-8. Relation to electronic signatures in global and national commerce act.

The Uniform Unsworn Foreign Declarations Act modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

History: Laws 2009, ch. 78, § 8.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 78, § 10 made the act effective July 1, 2009.